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79-1558

In the Supreme Court of the United States

October Term, 1979

No. 79-

DEWEY EUGENE COLEMAN, PETITIONER

vs.

STATE OF MONTANA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

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In the Supreme Court of the United States

October Term, 1979

No. 79-

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Dewey Eugene Coleman petitions for a Writ of Certiorari to review the opinions of the Supreme Court of Montana in this case.

OPINIONS BELOW

The opinions of the Montana Supreme Court are:

A. *State v. Coleman* (First Appeal), ____M.____, 579 P.2d 732 (Decided and Filed July 10, 1978) (Appendix p. 1)

B. *State v. Coleman* (Second Appeal), ____M____, 605 P.2d 1000, (Decided and Filed June 20, 1979) (Appendix p. 36)

C. The opinion denying Coleman's petition for rehearing on his second appeal, ____M.____, 605 P. 2d 1051, (Decided and Filed December 19, 1979) (Appendix p. 123)

D. *State of Montana ex rel. Dewey Eugene Coleman, petitioner, vs. Sentence Review Division of the Supreme Court of Montana*, Order on Application for Writ of Supervisory Control, (unreported) (Decided and Filed March 21, 1980) (Appendix p. 140)

JURISDICTION

The dates of the opinions and order sought to be reviewed and the time of the filing of each are as shown in the preceding paragraph.

Following the Montana Supreme Court's decision on Coleman's second appeal on June 20, 1979, Coleman timely appealed for rehearing, which was granted, and then following the submission of briefs and oral argument thereon was denied on December 19, 1979, as shown in the opinions referred to above.

On timely application for extension of time within which to file petition for certiorari, Mr. Justice Rehnquist, Associate Justice of the Supreme Court of the United States, by his order dated March 11, 1980, extended the time within which Coleman could file for certiorari to and including April 4, 1980.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER COLEMAN'S DEATH SENTENCE UNDER STATUTES NOT PASSED UNTIL AFTER HIS TRIAL AND CONVICTION VIOLATES EQUAL PROTECTION AND EX POST FACTO RIGHTS?

2. WHETHER DOUBLE JEOPARDY BARS COLEMAN'S DEATH SENTENCE ON AGGRAVATED KIDNAPPING WHICH LED TO THE DEATH OF THE VICTIM, WHEN HE HAD ALREADY BEEN CONVICTED AND SENTENCED FOR DELIBERATE HOMICIDE FOR HIS SAME ACT CAUSING THIS VICTIM'S DEATH AND WHERE AS PLEADED THESE ARE IDENTICAL OFFENSES?

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5. WHETHER THE MONTANA STATUTE UNCONSTITUTIONALLY LIMITS THE MITIGATING FACTORS THAT MAY BE CONSIDERED, PLACES THE BURDEN OF PROOF ON COLEMAN AND IS A MANDATORY DEATH STATUTE?

6. WHETHER THE MONTANA COURTS PROPERLY CONSIDERED SIMILAR CASES?

7. WHETHER COLEMAN WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO PRESENT ARGUMENT AS TO HIS DEATH SENTENCE?

8. WHETHER COLEMAN'S JURY WAS UNCONSTITUTIONALLY INSTRUCTED AS TO THE CRIMINAL INTENT THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and certain sections of the Montana Code Annotated, as set forth verbatim at Appendix p. 144.

STATEMENT OF THE CASE

Defendant Dewey Eugene Coleman has been resentenced to death for the crime of aggravated kidnapping under a judgment and order entered by the District Court July 10, 1978, and affirmed by the Montana Supreme Court in its decision on his se-

cond appeal, 605 P. 2d 1000 (App. p. 36), and in its decision denying his petition for rehearing, 605 P.2d 1051 (App. p. 123).

Coleman had been convicted by a jury on November 14, 1975 of the crimes of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. By their decision in the first *Coleman* appeal, 579 P.2d 732 (App. p. 1), the Montana Court there found Coleman's first death sentence to be based upon an unconstitutional mandatory death law and remanded his case to the District Court for resentencing on the aggravated kidnapping charge, and found the sentence imposed on Count III, sexual intercourse without consent, to be also erroneous and to be remanded for resentencing. His judgment of conviction on the deliberate homicide charge and its sentence of 100 years were affirmed.

The District Court on remand set a sentencing hearing in accordance with the provisions of certain new Montana death penalty laws passed after Coleman's trial and conviction, and denied his objections thereto. No evidence was offered by either party at the first hearing set on June 14, 1978, and the court accepted and filed a presentence report.

Thereafter, the court set July 10, 1978 as the date for sentencing, and just prior to that hearing handed counsel for the defendant and the State a copy of its written Findings, Judgment and Order resentencing Coleman to death on the aggravated kidnapping charge and fixing a 20 year sentence on the sexual intercourse without consent charge. When the hearing actually started, the court allowed Coleman's counsel and the State to present argument, although the court's decision had already been made.

The court found that an aggravating circumstance existed because the aggravated kidnapping offense had resulted in the death of the victim and that none of the mitigating circumstances listed by law were sufficiently substantial to call for leniency in his case, and that the only mitigating circumstance technically present was that Coleman had no record history of prior criminal activity. The decision made no reference to the mitigating factors set forth in the presentence report.

Coleman petitioned the District Court to reconsider its decision based on the fact that the court's decision had been made prior to the time that Coleman's counsel was permitted any opportunity

to present oral argument thereon, and because of the recent *Lockett v. Ohio* United States Supreme Court decision, handed down just a week prior to Coleman's sentencing, but this was denied. Coleman then appealed to the Montana Supreme Court, which was denied, 605 P.2d 1000, Coleman timely petitioned for rehearing, which was granted, but following the submission of further briefs and oral argument thereon, the Montana Supreme Court then denied his petition for rehearing, 605 P. 2d 1051.

Each question presented here for review was also presented to the Montana Supreme Court during Coleman's First and Second Appeals and in his Petition for Rehearing and were there denied by that Court.

STATEMENT OF THE FACTS

Coleman and Robert Dennis Nank, who was originally also charged with the same identical three-count information as was filed against Coleman, were travelling together by motorcycle on July 4, 1974, from Roundup, Montana toward Forsyth, Montana on U. S. Highway #12 and ran out of gas. At approximately that same time, Peggy Lee Harstad disappeared while driving on such same highway. On August 29, 1974, her body was discovered just west of Forsyth, Montana on the north side of the Yellowstone River. A pathologist found no physical evidence as to rape, or injury to her body, and was not able to determine the cause of death.

Coleman and Nank told opposite statements of fact as to what happened. Other than Nank's testimony, there was no direct or circumstantial evidence as to the then different facts. Every piece of evidence relied on by the State to corroborate Nank equally corroborated and was consistent with Coleman's testimony. Nank testified that Coleman and he had discussed hitch-hiking, and taking over the car and driver that stopped and possibly killing the driver. After stating that one car had stopped, but that the man and woman in it kept their doors locked, the man had his foot on the gas and refused to give them a ride, offering to send help back, Nank said that the girl stopped in her car and gave them a ride. Nank, sitting next to the girl, while driving down the highway, then reached over and turned the key off, steered the

car to a stop at the side of the road, and said that Coleman then got into the driver's seat and drove back to where their motorcycle was out of gas. Nank said that he put the girl in the back seat of the car, took her clothes off, tied her hands together with a rope, and attempted to rape her, failing because of his lack of an erection.

Nank testified that Coleman then removed his clothes and had intercourse with her in the back seat. Nank did not testify as to any facts showing any violence or bodily injury inflicted upon her or struggle by her at this time. Nank, who testified at length as to his foot fetish, said that he held her foot during this time. After then driving through Forsyth and to the Rosebud overpass, Nank testified that he then drove the car back through Forsyth, across the bridge on U. S. Highway #12 where he made a right turn down toward a railroad embankment. Nank said that he then dressed the girl, and took her out of the car, with her hands tied, and led her down to the river. At that place, Nank testified that Coleman hit her on the head with his helmet, that Coleman attempted to strangle her with a rope, and that Nank tried briefly to strangle her, but that she was then still alive. Nank then testified that the two of them placed her in the river, where Coleman held her feet and Nank held her head under water until she drowned.

Nank then testified that they drove her car back through Forsyth in an easterly direction until it ran out of gas. They then removed certain items from the car and walked back to Forsyth.

From this point, both Nank's and Coleman's statements as to what happened were basically the same. This included that Nank left Coleman in Forsyth, hitchhiked a ride back to where the motorcycle was, with gas, brought the motorcycle back to Forsyth, picked up Coleman, and that they then drove east, and then returned back to Forsyth and proceeded south to Sheridan, Wyoming to the Veterans Hospital there.

After being interviewed both by officials from the Sheriff's Department and the F.B.I. at the Hospital, Nank and Coleman left that hospital and went to Boise, Idaho where they obtained an apartment and where they were living at the time of their arrest.

Coleman testified that after their motorcycle ran out of gas and the one couple refused to give them a ride or let them in the car, that Nank told him that there were not many black people in this area so they would have a hard time catching a ride together, and that Coleman should stay and protect the motorcycle while he caught a ride. Coleman said that while he was sitting off the highway smoking, a car did stop and pick up Nank, but he did not see or know who the driver was. Coleman testified that after several hours, Nank then returned in a car, that he was wet and upset and acted very strange, told Coleman to get their things off the motorcycle and go with him in the car, that they then drove past Forsyth where Nank said he had to pick up something. They then stopped, Nank picked up a blanket and they then headed back to Forsyth. At that time, Nank advised Coleman that he had killed a woman and did not describe the details. The car then ran out of gas, Nank took something out of the car and hid it in a field near that area and gave Coleman a purse to carry. As they were walking back to Forsyth, Nank told Coleman to get rid of the purse, and so he threw it into a culvert. When they got back to Forsyth, Nank then again left Coleman there while he hitchhiked with some gas back to the motorcycle and then returned to pick up Coleman. Coleman then testified that Nank threatened him if he ever told these facts to anyone concerning what had happened that night.

Nank's testimony on this is shown beginning at Vol. IV of the transcript at page 796, and concluding at page 1267 of Vol. VI. Coleman's testimony is shown beginning at Vol. X, page 2373, and concluding in the transcript at Vol. XI, page 2541. Coleman also testified on rebuttal, Tr. Vol. XI, page 2600 and 2601. These facts are also set forth by the Montana Court in its first decision at 579 P. 2d p. 738 (App. p. 1)

DENIAL OF SENTENCE REVIEW

Without having had any notice as to or any hearing thereon, and without any right to present his facts, evidence, and law supporting his right to sentence review, the Sentence Review Division and the Montana Supreme Court on March 21, 1980 have

denied Coleman this right. (App. p. 140). Montana has a statutory procedure allowing review of sentences by the Sentence Review Division of the Supreme Court of Montana, which is made up of three district court judges appointed by the Supreme Court. 46-18-901 through 905, MCA 1979.

In supporting his right to sentence review in his March 6, 1980 application for a writ of supervisory control to the Montana Supreme Court, Coleman advanced legitimate reasons why he was entitled to this, including:

(1) that his two prison sentences on deliberate homicide and sexual intercourse without consent are clearly subject to sentence review (admitted by the Montana Supreme Court, but put off until and if Coleman is not hung), (2) that following his sentencing the State then advised him that he was entitled to sentence review by personally delivering to him an application to be used therefor, which Coleman relied on, (3) that the Montana statute in effect at the time of Coleman's conviction (95-2211, RCM, 1947, "Every sentence shall be subject to review . . .") although since repealed, then gave him the right to sentence review, (4) that another defendant convicted of a capital crime, Duncan Peder McKenzie, was granted the right to sentence review (581 P.2d 1227), and (5) that he has not yet had his constitutional due process rights to a full and proper appellate review of similar cases. It is Coleman's position that he has a constitutional due process right to a hearing on these issues before the Sentence Review Division of the Supreme Court of Montana and before the Montana Supreme Court before it rules against him.

Coleman will file a separate Petition for Certiorari to this Court on this March 21, 1980 decision, and as was done by McKenzie.

ARGUMENT

1. WHETHER COLEMAN'S DEATH SENTENCE UNDER STATUTES NOT PASSED UNTIL AFTER HIS TRIAL AND CONVICTION VIOLATES EQUAL PROTECTION AND EX POST FACTO RIGHTS?

Coleman was resentenced to hang on July 10, 1978 under new statutes which were not in effect at the time of his crime, and were not in effect at the time of his trial and conviction.

The aggravated kidnapping crime here took place on July 4, 1974. The jury returned its verdict of guilt on November 14, 1975. Coleman's first hanging sentence on this charge was reversed by the Montana Supreme Court on his first appeal as imposed under an unconstitutional mandatory death penalty statute. The Montana Legislature then passed new death penalty laws, 46-18-301 through 310, MCA 1979, set forth in full at Appendix p. 144, which became effective July 1, 1977, and which were on July 10, 1978 used to sentence him to hang.

Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290, relied on by the court below to overcome these constitutional objections actually supports Coleman, as all those defendants in Florida who were convicted prior to the effective date of the new Florida death laws had their sentence commuted to life sentences. Dobbert was *retried* and *convicted* and sentenced under the new Florida death statutes then in effect.

> "After our Furman decision and its own decision in Donaldson v. Sack, the Florida Supreme Court resentenced all prisoners under sentence of death pursuant to the old statute to life imprisonment. Anderson v. State, 267 So 2d 8 (1972); In re Baker, 267 So 2d 331 (1972). Petitioner argues that since his crimes were committed before our decision in Furman, the imposition of the death sentence upon him pursuant to the new statute which was in effect at the time of his trial denies him equal protection of the laws.
>
> But petitioner is simply not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to Furman, as were they, and the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first-degree murder so as to make the application of this new statute to him consistent with

> the Ex Post Facto Clause of the United States Constitution. Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process so as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision, and those whose cases involved acts which could properly subject them to punishment under the new statute. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence." (432 U.S. 301)

Then *Dobbert* relied upon notice that the death penalty may apply from the Florida unconstitutional death act, while Montana law held that an unconstitutional law was void and not a law in any way. In *Ex parte Anderson,* 125 Mont. 331, 238 P.2d 910, the Montana Supreme Court said:

> " 'An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' Ex parte Sibold, 100 U.S. 371, 376, 25 L.Ed. 717."

In *State v. District Court,* 130 Mont. 103, 295 P.2d 1042, it was held:

> " 'An unconstitutional state is void, and a void thing is nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to observe it. In contemplation of law it is inoperative as though it had never been passed.' "

So in ruling that "At the time the crime was committed the statutes were clear that the penalty of death was a very probable consequence of the crime" in its second appeal decision (605 P.2d 1014) (App. p. 51), the Montana Supreme Court erred. Probably the controlling factor was the prefacing statement by the Montana court to this holding that: "There are 'hard facts' present in this appeal which this Court must consider in making its determination." 605 P.2d 1013 (App. p. 51).

Then Montana has a statute as to the construction of its laws, 1-2-109, MCA 1979:

> "No law contained in any of the Codes or other statutes of Montana is retroactive unless expressly so declared."

Even though the records of the committees considering the new death penalty laws in the 1977 Legislature disclose that the committees were there advised in writing by reports submitted that the then existing death law for this particular crime was unconstitutional, and the Legislature then enacted the new death laws under which Coleman was sentenced to hang, these new death laws did not expressly declare that they were to be retroactive.

In *State v. Rhodes,* ____Mont.____, 425 P.2d 1095, and based on *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the Montana Supreme Court held the then Montana death statute unconstitutional as to the two defendants there involved, reversed the death sentences there imposed, and modified the judgments "by imposing sentences on each of the defendants of imprisonment in the Montana State Prison for the term of his natural life." This happened even though the Legislature had by then replaced the death penalty statutes with new statutes.

> "Subsequently the legislature enacted into law a mandatory death penalty. We emphasize here that this holding does not in any way purport to rule on the validity of the new statute, passed as Sec. 2, Chapter 262, Laws of 1974 (Section 94-5-105, RCM, 1947, as amended)."

Then the death sentence of a Robert Close, likewise convicted of aggravated kidnapping which led to the death of the victim, was on appeal when the Montana Court ruled his first death penalty unconstitutional. His appeal was dismissed by agreement and he was resentenced to the Montana State Prison.

Coleman contends that the actions of the Montana Supreme Court in his case violates equal protection and fundamental due process of law when compared to *Rhodes, Shields* and *Close.*

Since *Dobbert,* the highest courts of many other states have held contrary to the Montana Supreme Court in *Coleman,* and have refused to uphold a death sentence imposed under a law not in effect at the time of the conviction. See *People v. Payne,* 75 C.A.3d 601, 142 Cal. Rptr. 320 (1977); *People v. Harvey,* 76 C.A.3d 441, 142 Cal. Rptr. 887 (1978); *Miller v. State,* (Tenn. 1979) 584 S.W.2d 758; *State v. Collins,* (La. 1979) 370 So.2d 533; *State v. Rogers,* 270 S.C. 285, 242 S.E.2d 215 (1978); *Lee v. State,* 340 So.2d 474 (1976); *State v. Lindquist,* 99 Idaho 766, 589 P.2d 101; and *People v. Terron,* 23 Cal. 3d 103, 151 Cal. Rptr. 633, 588 P.2d 773, and this conflict should be resolved.

In *Rabe v. Washington,* 405 U.S. 313, the conviction was reversed where made "under a statute with a meaning quite different from the one he was charged with violating." Coleman's sentence to hang was based on a trial and facts heard there by the sentencing judge at the time when Montana then had in effect its later held unconstitutional mandatory death law and no one then acted under any apprehension that these trial facts would later be support to hang him under the new and later passed statutory standards.

2. WHETHER DOUBLE JEOPARDY BARS COLEMAN'S DEATH SENTENCE ON AGGRAVATED KIDNAPPING WHICH LEAD TO THE DEATH OF THE VICTIM, WHEN HE HAD ALREADY BEEN CONVICTED AND SENTENCED FOR DELIBERATE HOMICIDE FOR HIS SAME ACT CAUSING THIS VICTIM'S DEATH AND WHERE AS PLEADED THESE ARE IDENTICAL OFFENSES?

Double Jeopardy bars Coleman's conviction and death sentence for aggravated kidnapping as he had already been convicted on and received the maximum sentence by law for his one single act of causing this victim's death in his deliberate homicide conviction and he can not constitutionally be punished twice for this one act. As pleaded in the information, his conviction on aggravated kidnapping is likewise barred as the provisions of deliberate homicide and aggravated kidnapping did not each require proof of a fact which the other did not.

By Count I of the information, Coleman was charged with deliberate homicide, convicted and received the maximum sentence permitted by law for that crime of 100 years in the Montana State Prison. Although certain statutorily listed aggravated circumstances can permit the death penalty for the crime of deliberate homicide, 46-18-303, MCA 1979, none of these aggravating circumstances were present in this case, and so it was not possible in any event for Coleman to be sentenced to die on his conviction of this crime.

By Count II of the information, Coleman was charged with the crime of aggravated kidnapping, which was amended by the court's own motion to also include the allegation that this kidnapping led to the death of the victim. The jury first returned its verdict of guilt as to deliberate homicide, and then found a verdict of guilt as to the aggravated kidnapping, plus the jury's factual verdict that this kidnapping led to the death of the victim. Coleman's first hanging sentence was reversed by the Montana Supreme Court on his first appeal as the then death statute providing for such hanging was ruled unconstitutional. 579 P.2d 742. (App. p. 9). So when Coleman then faced resentencing on this conviction of aggravated kidnapping, he had then been previously convicted of deliberate homicide, received the maximum sentence provided by law therefor, and both had been affirmed on appeal to the Montana Supreme Court and were final. He had been punished to the maximum extent of the law for his act causing the death of this victim. But then, because his aggravated kidnapping crime led to his same act causing the death of this victim, Coleman was then sentenced to hang therefor. Causing the death of the victim is the only act providing an aggravating circumstance that can allow the death penalty for this crime. 46-18-303(7), MCA 1979.

Ex parte Lange (N.Y. 1874), 85 U.S. 170, 18 Wall 170, 21 L.Ed. 872, holds that it is very clearly the spirit of the double jeopardy constitutional clause to prevent a second punishment under judicial proceedings for the same crime. Coleman agrees that it

would be possible under the statute for him to be convicted and punished for both deliberate homicide and for aggravated kidnapping, but when the State here used the same identical act on which his deliberate homicide was based and for which he was punished, that is causing the death of the victim, and uses that same identical act to enhance his punishment for aggravated kidnapping, and to use that same act to hang him for causing the death of the victim, then this violates his constitutional right to not be placed in double jeopardy as to his punishment.

In defining this right in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072, this Court said:

> "And it protects against multiple punishments for the same offense. ... The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of Ex parte Lange, 18 Wall 163, 168, 21 L.Ed. 872, 876.
>
> 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of (this rule's) entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.
>
> " '. . . (T)he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.' Id., at 173, 21 L Ed at 878."

U. S. v. Wilson, 420 U.S. 332, 43 L.Ed.2d 232, 95 S.Ct. 1013, cited *Pearce* in its rule that the double jeopardy clause protects against "multiple punishments for the same offense."

Crain v. U.S., 162 U.S. 625, 40 L.Ed. 1097, 16 S.Ct. 952, holds that a judgment in a criminal cause on a verdict of guilty on any count "will be a bar to any further prosecution in respect of any of the matters embraced by it."

There is inconsistency in these statutes which did not allow Coleman to be hung for deliberately killing this victim and do allow this for a lesser crime of kidnapping. There is an explana-

tion which is that these penalty provisions for aggravated kidnapping, 45-5-303(2), MCA 1979, call for a maximum sentence of ten years if the victim is released alive and unhurt and a maximum of death if the kidnapping leads to the victim's death, a commendable statute for use in any bargaining with kidnappers holding hostages. However, here the statute has been used to violate Coleman's right not to be punished twice for his one single act.

This point can be illustrated by an extreme example. Suppose Coleman's death penalty is reversed as unconstitutional but the state prosecutors are still determined to hang him. They convince the legislature to pass a new law that the felony of stealing an automobile when the owner is in it is a capital crime if that theft leads to the death of the victim. As per the Montana Supreme Court this would not be ex post facto or retrospective if the death provisions could be "less onerous" or "ameliorative" or "procedural" and so that court could again approve Coleman's hanging. Coleman contends this would constitute double jeopardy.

Then double jeopardy applies here where the provisions of each crime, as pleaded, did not require proof of a fact which the other did not. This came true after the trial court, over his objection and of its own motion, amended the aggravated kidnapping charge to add the clause that it led to the death of the victim.

We quote the complete charging clauses of Count I, deliberate homicide, with those from Count II, aggravated kidnapping, side by side as taken from the amended information shown in full at Appendix page 143:

"Count I: Deliberate Homicide"	= "Count II: Aggravated Kidnapping
"defendant purposely and knowingly"	= "defendant knowingly and purposely"
"caused the death of another human being, to wit: Peggy Lee Harstad"	= "the alleged actions of the defendant resulted in the death of Peggy Lee Harstad"

"while engaged in the commission of the following felonies: kidnapping and sexual intercourse without consent"	= "without lawful authority restrained her in a place of isolation and by use of physical force to facilitate the commission of a felony, to-wit: sexual intercourse without consent"
"involving the use of physical force and violence against the said Peggy Lee Harstad"	= "for the purpose of inflicting bodily injury on and terrorizing the said victim"

There just is no provision in Count I that is not also included in Count II and the contrary is likewise true.

This violates *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221:

> " 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . .' "

The Montana Supreme Court was simply in error in its holding that:

> "Count I, in addition, required proof of the death of the victim which Count II did not; and Count II required proof of a purpose to inflict bodily injury and terrorize the victim which Count I did not." (605 P.2d 1009) (App. p. 42)

Possibly that court was referring to the original information, which prior to the trial court's own amendment did not require proof that Coleman caused the death of the victim. As to its holding that only "Count II required proof of a purpose", it is clear that every element of both Count I and Count II required proof that Coleman acted both "purposely and knowingly".

3. WHETHER THE SELF-EXCUSAL PROCESS USED IN SELECTING HIS JURY PANEL DEPRIVED COLEMAN OF HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY PICKED AT RANDOM FROM A FAIR CROSS SECTION OF THE COMMUNITY?

Out of 200 names drawn for his jury panel, only those 61 jurors were summoned who agreed to serve, and the rest were allowed to excuse themselves from serving. An impartial jury must include both persons who do and those who do not want to serve.

Coleman moved successfully to discharge the jury panel first drawn to hear his trial then set for October 20, 1975. A new panel was ordered drawn to report for his trial which was then continued for just three days and until October 23, 1975.

Coleman again moved that this second jury panel be discharged and supported this by the filed affidavit and testimony of Charles J. Pemble, Chief Deputy Clerk of the District Court, who was placed in charge of the selection of such jury panel, who said:

> "As directed by such Judges, this Office then checked addresses and phone numbers of such 200 jurors drawn and corrected these addresses where necessary and then telephoned as many of such 200 jurors as could be reached by telephone, asking each one if they could be available for jury duty on October 23, 1975. Out of all those telephoned, 61 replied that they could be available and these 61 were requested by telephone to come to the Courthouse at Billings, Yellowstone County, Montana on October 23, 1975 to serve on this jury panel. No jury questionnaires were given to these people."

Coleman's objections to this second jury panel included his challenge to the procedure used by such clerk in securing the 61 jurors who reported for duty. Although Montana statutes provide for the drawing of these names at random, and excusal only by the court, 25-7-206(2), MCA 1979, this procedure was not followed. More than one-half of such jury panel were allowed to excuse themselves, without any legal excuse therefor, other than

that they were nct available on such short notice, violating Coleman's constitutional right to an impartial jury selected at random from a fair cross section of the community.

In holding that "juries must be drawn from a source fairly representative of the community", this Court in *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975), explained that:

> "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

In *Duren v. Missouri*, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979), it was held that the Missouri statute's exemption of women from jury service on request violated the defendant's rights as guaranteed by the Sixth and Fourteenth Amendments in failing to insure that jurors in criminal cases were drawn from a fair cross section of the community. So this Court has held unconstitutional in *Taylor* a system where a woman could not serve on a jury unless she filed a written declaration of her willingness to do so, and in *Duren* a system which provided an automatic exemption from jury service for any woman requesting not to serve.

Justic Shea dissented on Coleman's first appeal on these grounds and would have ordered a new trial. (579 P.2d 754) (App. p. 31)

4. WHETHER THE MONTANA DEATH STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN DENYING COLEMAN HIS RIGHT TO A JURY VERDICT AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRIATENESS OF HIS DEATH PENALTY?

This question was not decided by this Court when it reversed the death sentence in *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954.

In view of the "awesome finality of a capital case" (*Kinsella v. Singleton*, 361 U.S. 234, 249, 255 (1960) dissenting and concurring opinion of Mr. Justice Harlan), American jurisdictions had,

prior to *Furman*, determined with near unanimity that the death penalty should be put in the hands of the jury rather than the judge. Indeed, "(e)xcept for our states that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha v. California*, 402 U.S. 183, 200 n. 11 (1971).

This Court has now held that "*McGautha's*" assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience." *Gregg v. Georgia*, 428 U.S. 153 at 196 n. 47 (plurality opinion). This Court has reaffirmed the desirability of jury input in the capital sentencing process, *id.* at 190; *Proffitt v. Florida*, 428 U.S. 242 at 252; and it has struck down the death penalty laws of three states for their failure to provide a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 at 333-334.

In upholding the Florida post-*Furman* death penalty statute in *Proffitt*, this Court approved only the most limited encroachment upon the tradition that juries rather than judges must speak to the question of life or death.

Although it may be permissible to permit a sentencing judge to review a jury sentence determined under the influence of passion or prejudice, or against the weight of the relevant aggravating and mitigating evidence, the imposition of the death penalty under Coleman's procedure which afforded no opportunity for meaningful jury input cannot be squared with the Sixth, Eighth and Fourteenth Amendments.

"The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." *Marion v. Beto*, 434 F.2d 29, 32 (CA5 1970). Jury participation in such a decision represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Snyder v. Massachusetts*, 291 U.S. 97, 104 (1934). Because "the action of the sovereign in taking the life of one of its citizens. . .differs dramatically from any other legiti-

mate state action", *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393, 402 (1977) (plurality opinion), it is vitally important that the death-sentencing decision neither be nor appear to be made in an arbitrary or capricious manner. *Gregg v. Georgia, supra; Gardner v. Florida, supra; Furman v. Georgia*, 408 U.S. 238. Death sentencing by a restricted corps of legal professionals, and particularly by one of their number sitting as the sole judge of life or death, presents an aspect and a danger of arbitrariness to which American history has responded by the all-but-ubiquitous involvement of lay juries in the sentencing process - a "likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate." *Codispoti v. Pennsylvania*, 418 U.S. 506, 515 (1974).

A jury determination is "a significant and reliable objective index of contemporary values. . ." *Gregg v. Georgia, supra*, 428 U.S. at 181 (plurality opinion). At a time when society has rejected "the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life or habits of a particular offender'," *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion), it is the only precise indicator of those standards.

This argument is compelling where aggravating circumstances are built into the definitions of capital crimes. *Stanislaus Roberts v. Louisiana, supra*, 429 U.S. at 334-35 (plurality opinion). So long as the punishment determination is taken out of the hands of the jury, it is no less compelling where - as in Coleman's case, his jury's verdict of conviction plus the finding that it led to the victim's death, triggered his death sentence, subject only to reduction upon a later judicial finding of the absence of a "sufficiently substantial" mitigating factor.

This constitutional problem can be exemplified in this case. First this trial was held under a mandatory death statute, later declared unconstitutional by the Montana Court. The trial judge, on his own motion, amended the information to add the clause that was necessary before a death sentence could be applied. The jury was advised in voir dire by the prosecuting attorney that there was a possibility of a death sentence. The trial judge tried the case under the then mandatory death statute and on conviction then sentenced Coleman to death without any kind of a pre-

sentence investigation and report, and without any argument thereon by Coleman's counsel.

Then even though his first death sentence was reversed, he was remanded for resentencing to the same judge, who then resentenced Coleman to hang under a statute which was not in existence at the time of this crime and at the time of Coleman's trial and conviction.

To further compound this process, the sentencing judge then refused to find the Montana statutory mitigating factor that "the defendant has no significant history of prior criminal activity", 46-18-304(1), MCA 1979, even though the clear record, as set forth in the presentence report filed, was that Coleman had *never ever* either been arrested for or convicted of any crime whatsoever.

In the zeal to hang Coleman, the sentencing court's findings were that this was just a "technical" mitigating factor, and the court set forth the fact that during this trial Coleman's co-defendant testified that earlier the same day of the crimes involved here that Coleman and Nank had entered a home and stolen rifles. This was never corroborated during trial, or afterwards at sentencing by any report that any such crime was ever committed or ever reported anywhere.

Presnell v. Georgia, 439 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235, appears directly in point in its holding at 439 U.S. 16 that:

> "In Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for a unanimous Court:
>
> 'It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . .' "

Coleman should not be hung only on the uncorroborated testimony of his accomplice, who was testifying based on his plea bargain to save his neck, that Coleman had committed this other crime.

5. WHETHER THE MONTANA DEATH STATUTE UNCONSTITUTIONALLY LIMITS THE MITIGATING FACTORS THAT MAY BE CONSIDERED, PLACES THE BURDEN OF PROOF ON COLEMAN, AND IS A MANDATORY DEATH STATUTE?

Two United States Supreme Court opinions handed down July 3, 1978, *Lockett v. Ohio,* 438 U.S. 586, 57 L. Ed.2d 973, 98 S.Ct. 2954, and *Bell v. Ohio,* 438 U.S. 637, 57 L.Ed.2d 1010, 98 S. Ct. 2977, just one week before Coleman's latest death sentence on July 10, 1978, cited to his sentencing court, invalidate Montana's death laws.

In *Lockett* the plurality opinion states:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to all circumstances of the offense offered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

This quotation from Justice White's dissent sums up this holding:

> "Today the Court holds, again through a plurality, that the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant to the appropriateness of the penalty for the individual offender."

Justice Rehnquist's dissent summarizes this opinion as::

> "We are now told, in effect, that in order to impose a death sentence a judge or jury must receive in evidence whatever the defense attorney wishes them to hear."

In *Bell,* the court referred to *Lockett* and stated:

> "Bell contends that the Ohio death penalty

> statute violated his rights under the Eighth and Fourteenth Amendments because it prevented the sentencing judges from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors. For the reasons stated in Part III of our opinion in Lockett v. Ohio, supra, we have concluded that 'the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any aspect of the offense that the defendant proffers.' We also concluded that: 'The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors,' that is required by the Eighth and Fourteenth Amendments. We therefore agree with Bell's contentions."

The Montana statute under the 1977 death penalty clauses, 46-18-305, MCA 1979, in relevant part states:

> ". . .the court. . .*shall* impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances *sufficiently substantial* to call for leniency." (emphasis supplied)

Although much of *Lockett* and *Bell* is critical of the fact that the Ohio statute limited the mitigating circumstances to just the three there specified, and the Montana statute is broader in listing the mitigating circumstances that may be considered, these decisions render unconstitutional the Montana statute which mandates that the court "shall" impose a mandatory death penalty unless the court "finds that there are no mitigating circumstances *sufficiently substantial* to call for leniency." The statute may not so limit the mitigating factors considered, or impose this standard as to their consideration. This Montana Statute puts the burden of proof on Coleman to establish mitigating circumstances and further limits the sentencing judge's "consideration of relevant mitigating factors" to only those he must first find "sufficiently substantial." He is forbidden a right to give "inde-

pendent mitigating weight" to have "unguided discretion" and is specifically "precluded from considering as a mitigating factor any aspect. . .that the defendant offers."

Such a determination made for such a purpose cannot escape the command of the Constitution that the state which establishes any distinction of preponderant importance in the assessment of criminal culpability must "require the prosecution to establish beyond a reasonable doubt the fact(s) upon which it turns." *Mullaney v. Wilbur,* 421 U.S. 684, 698 (1975). "Because of (the). . . qualitative difference (between the sentence of death and one of life imprisonment), there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. at 305 (plurality opinion). "The reasonable-doubt standard. . .is a prime instrument for reducing the risk of convictions resting on factual error," *In Re Winship,* 397 U.S. 358, 363 (1970); and is necessary to reduce the same risk in the infliction of the extreme penalty of death, as to which any avoidable error would be intolerable. See *Gardner v. Florida, supra.*

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value. . .this margin of error is reduced as to him by the process of placing on the other party the burden (of proof). . . beyond a reasonable doubt."

Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

It can hardly be denied that Coleman has at stake an interest of transcendent value. Nevertheless, Montana has decreed that *he* must bear the burden of persuasion of the facts on which his life depends, and must die even though it is clear that the Montana mitigating circumstances exists that Coleman had no prior criminal record and that this warrants his salvation even under the narrow calculus of the Montana statute. This Court should not permit such a sentencing system to stand.

Coleman further questions the different standards fixed by statute as to the aggravating and mitigating circumstances, as the sentencing judge is only required to "find" an aggravating

circumstance, while a mitigating circumstance must be found "sufficiently substantial" before it may save his life. As this statute was then applied to Coleman he was faced with a sentencing judge who found that his arrest-free, conviction-free record was just a "technical" mitigating circumstance and one not worthy to be found as "sufficiently substantial."

One further point bears noting here. Other states' statutes require a "weighing" of aggravating and mitigating circumstances, and many decisions discuss whether the mitigating circumstances "outweigh" the aggravating circumstances. Although the Montana statute does not so provide, the sentencing judge and the Montana Supreme Court have used this language erroneously. The statutory unequal and discretion limiting standards in Montana are simply to "find" an aggravating factor, which then mandates that a death penalty "shall" be imposed, except and only if a mitigating factor is found "sufficiently substantial" to call for leniency.

6. WHETHER THE MONTANA COURTS PROPERLY CONSIDERED SIMILAR CASES?

The lower court failed to promulgate rules to consider similar cases, refused to allow Coleman to fairly argue similar cases and failed to consider similar cases in upholding Coleman's death sentence.

46-18-310, MCA 1979, provides in Part:

> "With regard to the sentence, the court shall determine:
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

46-18-308, MCA 1979, provides in part as to the automatic review of any sentence of death by the Montana Supreme Court:

> "The review by the Supreme Court. . .shall be heard in accordance with rules promulgated by the Supreme Court."

No such rules have been promulgated to date by the Supreme Court despite Coleman's request therefor during his appeal.

The first *Coleman* decision said, 579 P.2d 732 at p. 742:

> "To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. See: Gregg v. Georgia (1976), 428 U.S. 153, 96 S.CT. 2909, 49 L.Ed.2d 859; Proffitt v. Florida (1976), 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; Jurek v. Texas (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929."

Gregg holds that under that state's procedure for expedited review, the Georgia Supreme Court must consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." An affirmance of the death sentence must be accompanied by a reference to similar crimes that the Supreme Court has taken into consideration.

Gregg notes that the Georgia Supreme Court's review of each sentence to determine whether it is proportionate to other sentences for similar crimes is intended to prevent caprice in this inflection of the penalty and that "if a time comes when juries generally do not impose the death sentence in a certain kind of murder case" the court said, the appellate review procedures assure that no defendant convicted of such a crime will suffer a sentence of death.

Proffitt states:

> "Under Florida's capital sentencing procedures, in sum, trial judges. . .decisions are reviewed to insure that they are consistent with other sentences imposed in similar circumstances."

Jurek approved that state's procedure for expedited review by the Texas Court of Criminal Appeals.

In its decision affirming this second hanging sentence imposed upon Coleman, the Montana Supreme Court made its only findings and rules as shown at 605 P.2d 1018 (App. p. 63).

So the standards of review, as set forth for the first time in the *Coleman* decision, and without allowing Coleman to be heard thereon, provide the Montana Supreme Court's determination that the court "need not examine *every* similar case whether appealed or not, rather we need only examine those cases where

after conviction the death penalty could have been or was imposed that have reached our attention through the appellate process"; that, "because it is extremely rare a defendant would acquiesce in a death sentence, we believe this procedure will insure we have a more than adequate representation of 'similar cases' "; and that "we will thus consider cases where the defendant has been charged with kidnapping and murder of the victim of the kidnapping and where the defendant has been charged with aggravated kidnapping where the victim has been killed."

Then the decision discusses as similar cases the two men convicted in *State v. Rhodes,* the defendant in *State v. McKenzie,* and the case of *State v. Robert Dennis Nank,* and based on these cases only finds that Coleman's death sentence "was not excessive or disproportionate to the penalty imposed in similar cases in this state."

An examination of *Rhodes* discloses:

> "The two defendants, Shields and Rhodes, had escaped from jail in Mountain Home, Idaho where they overpowered the sheriff at 9:15 a.m. on September 17, 1972 taking with them two revolvers, a .38 caliber S & W and a .357 S & W. They also took a police officer as hostage. On that same day the two defendants took by force an automobile belonging to Edward and Margaret Uffelman of Dayville, Oregon. . .
>
> Shields and Rhodes were charged in Federal Court with kidnapping in respect to their abduction of hostage batton, they plead guilty and were each sentenced to 10 years.
>
> Shields and Rhodes had each been convicted of felonies previously; Shields of burglary and Rhodes of manslaughter. The evidence in this case is clear, convincing and beyond any doubt of a series of crimes and of a vicious, wanton, cold-blooded murder of Don Kalberg."

Coleman's record of no prior convictions, and no prior arrests for any crimes of any nature whatsoever is not similar to Shields and Rhodes.

Then actually, Rhodes and Shields justify the reversal of Coleman's hanging sentence. They were sentenced to hang under an unconstitutional statute, as held by the Montana Supreme Court, and their sentences were modified by the Montana Supreme Court to "sentences on each of the defendants of imprisonment in the Montana State Prison for the term of his natural life." (524 P.2d 1101).

Then the *Coleman* decision compared *McKenzie* where that court held, at 557 P.2d, p. 1033:

> "Judge Nelson, prior to sentencing, had a thorough pre-sentence report compiled on defendant which indicated this was not his first encounter with the law. Defendant was a former parolee at the time of the murder having been convicted in 1970 of the crime of aggravated assault on another woman. That woman was found brutally beaten, clad only in a blouse crawling alongside a road. Defendant received a three year sentence for that crime, was paroled after some six months in the prison, but returned to prison after numerous parole violations. In 1972 he was again paroled as safe to be at large in society. That parole had expired three months before the present crime. The findings and conclusions found no circumstances that mitigated defendant's conduct. In addition, Judge Nelson found defendant should never be allowed to be free in and endanger society again."

This certainly does not compare to Coleman's conviction-free arrest-free record and the favorable reports on Coleman's prior life shown in his presentence report.

The third case compared by the Montana Supreme Court, that of *Nank*, seems incredible. Based on the jury's verdict as to Coleman, both men were guilty of exactly the same crimes. However, here again, Nank had a record of previous felony conviction, and Coleman had none. As to the particular facts of the crime involved, Nank's own sworn testimony showed that he initiated the acts that led to the victim's kidnapping when he alone turned off the key to the car while she was driving down the road and

steered the car to the side of the road, that Nank first attempted to have intercourse with her, and that Nank was the one who completed this crime by holding the victim's head under water until she drowned. The only other difference between the two cases is that Nank plead guilty and agreed to testify against Coleman, whereas Coleman proclaimed his innocence and exercised his constitutional right to a jury verdict thereon. So the comparison is between Nank, a prior felon, a confessed kidnapper, raper, and murderer, a white man, who received a 100 year sentence, eligible for parole in 12 years, with Coleman, who has no previous criminal record, no previous arrest record, a black man, whose sentence to hang was approved by the court.

One difference strenuously objected to by Coleman below is that Nank was permitted to plea bargain for his 100 year sentence and when Coleman, in writing, offered to plead guilty if he would receive the same sentence as Nank, the prosecutors refused to plea bargain at all and Coleman was forced to trial. It is Coleman's position that the sole difference is the color of his skin when his crime involves the rape, kidnapping and killing of a white girl and that this unconstitutionally violates his right to equal protection. "Similarly situated defendants should be afforded equal plea agreement opportunities." A.B.A. Standards for Criminal Justice, Standards Relating To The Prosecution and the Defense Function, approved draft (1971) at 102.

Even under the limited standards set by the Montana Supreme Court in *Coleman*, there are other cases that should have been considered. One strikingly similar case is *Andra Stewart*, who was represented by Coleman's present counsel. He was convicted of aggravated kidnapping which led to the death of that victim. As reported at 573 P.2d 1138, Stewart was first sentenced to 100 years, reversed because of erroneous procedures following by the sentencing judge, and he was then sentenced to serve 30 years and was released on parole after six years.

Then *Robert Close's* death sentence on his conviction of the exact same crime as Coleman's was on appeal when the Montana Supreme Court first reversed Coleman's first death sentence as unconstitutional. His appeal was then dismissed and he was sentenced to the State Prison.

A list of other similar cases appealed to the Montana Supreme Court and some on file in Yellowstone County, Montana, which list and with all facts set forth here was also furnished to the Montana Supreme Court at the time of oral argument on rehearing and which was not discussed by that Court, is at App. p. 154.

One possible method to compare sentences would be as was proposed by Coleman in a motion to the Montana Supreme Court prior to its decision on his second appeal. That motion asked first that the state provide a list of all persons then serving in the Montana State Prison, whose crimes involved the death of their victims. This list was furnished by the State. App. p. 147. The motion asked that Coleman's counsel be permitted to examine the presentence report as to each one of these defendants, and there abstract the relevant facts involved and then argue as to similarity. Due process requires that Coleman's counsel have an opportunity to obtain facts as to similar cases, and have a hearing where he can present his argument thereon to the court, prior to the court's decision as to similar cases.

It is submitted that any meaningful comparison would at a minimum show the previous felony records of all such defendants, and would show their race. There is no way that this can probably be done unless access to the presentence reports would be made available. A copy of the list of persons furnished by the State, the 44 names referred to above, was sent to Dewey Coleman, to determine their race. Of the 36 persons known to him, not one was black. The only name on this list known to Coleman or to his counsel who was also black is Andra Stewart.

After having granted Coleman's Petition for Rehearing and having stated in its second opinion, 605 P2d 122 (App. p.66) that:

> "If defendant or defendant's counsel should wish, he may submit a list of any other similar Montana cases that he may request us to review for comparative purposes, within the time provided for and as a part of any petition for rehearing in this cause."

and after Coleman then submitted such information, as set forth above, the Montana Supreme Court then not only refused to consider the same, but in their opinion on rehearing then erroneously held that their only duty on review of a capital case was to affirm the discretion of the sentencing trial judge by holding:

> "Further we see no reason to change our position with respect to the similar cases that we looked at in order to determine whether or not the death sentence in Coleman's case was disproportionate. We take our duty to be, in connection with whether a death sentence is disproportionate, that we should review the circumstances of the crime of which the defendant is accused, and in the light of those circumstances, the judgment and the sentence thereupon imposed; and, examine cases involving similar crimes, all for a single purpose, to make certain that as far as the defendant in this case, Coleman, is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. We find this to be true in this case. It should be understood that in the final analysis, the imposition of sentence is not one that this Court must undertake. That matter is still reserved under our statutes to the District Courts. There is a discretion vested in the District Court in capital cases as to whether the death penalty should be imposed. Once that discretion has been exercised, and if we find that it has been exercised fairly, indiscriminately and in accordance with applicable statutes, then it must be upheld. The search for disproportionateness involves elements that consider the gravity of the crime, the brutality with which it may have been committed and the factors, if any, which lead to a call for leniency. We look for the evenhanded application of death sentences without regard to sex, color, creed, or race, or any other discriminating consideration. When we find that this has occurred, as we find here, our course under the law is to uphold the decision of the District Court.

This does not comport with every decision of the United States Supreme Court as to the requirements of appellate review of death sentences or for that matter with the Montana statute.

Justice Shea's dissent in the second appeal sets forth certain appropriate views as to the total actions taken by the sentencing judge. 605 P.2d 1022. (Appendix p. 67).

The ironical similar case never discussed is that of the last man hung in Montana on September 10, 1943, a black named Phillip Coleman. Both Colemans were born in Missouri and their crimes were committed at the ages of 25 and 27. In the first Coleman case, Louis Brown confessed that he was an accomplice to the two murders and that Coleman was responsible, was sentenced to 100 years and paroled in 15 years. Robert Nank, testifying against Dewey Coleman, will be eligible for parole in 12 years on his 100 year sentence. Both Colemans believed that racial prejudice was involved in their death sentences, Phillip Coleman stating, "If I was white and had some money, I could beat this case." The basic dissimilarity is that Phillip Coleman confessed to eight murders just before he was hanged and Dewey Coleman steadfastly maintains his innocence and has no criminal record.

7. WHETHER COLEMAN WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO PRESENT ARGUMENT AS TO HIS DEATH SENTENCE."

Coleman's counsel was not permitted to present oral argument to the sentencing court as to the sentences he might receive, including his death sentence, at a sentencing hearing and prior to the time that the court made its "Findings, Conclusions, Judgment and Order." Before the start of the July 10, 1978 sentencing hearing, the judge delivered to Coleman's counsel a copy of these, setting forth his justification as to why Coleman should hang. Although on request the court then permitted Coleman's counsel to speak on this, it is clear this was after the decision had been fully made.

On denying a petition for rehearing, the sentencing court acknowledged that his findings and conclusions had been prepared prior to the hearing and justified the actions taken by stating that counsel did not raise anything new or that had not been considered except *Lockett v. Ohio*, and then distinguished this case.

This violates Coleman's constitutional right to due process and specifically the Montana Statute, 45-18-302, MCA 1979, requiring that "the defendant or his counsel shall be permitted to present argument for or against sentence of death."

8. WHETHER COLEMAN'S JURY WAS UNCONSTITUTIONALLY INSTRUCTED AS TO THE CRIMINAL INTENT THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT?

The Montana Court approved an instruction which told the jury it could convict Coleman on proof of a homicide alone as the jury could infer from this the only other fact necessary, Coleman's criminal intent. The Court held at 605 P2d 1052 (App. p. 124) that:

> "The instruction to which Coleman objects on the basis of *Sandstrom* is the trial court's instruction no. 22 as follows:
>
> 'If you find that the defendant Dewey Eugene Coleman committed a homicide and no circumstances of mitigation, excuse or justification appear, then you may infer that the homicide was committed knowingly or purposely."
>
> The *Coleman* instruction refers to an inference of fact, a deduction that logically could be inferred by the jury under proof of the circumstances stated. The possible inference, by its terms is not in itself unreasonable."

In *Sandstrom v. Montana*, ___ U.S. ___, at p.___, this Court said that determining whether the state has been relieved of its burden of proof, "requires careful attention to the words actually spoken to the jury. . .for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instruction."

Although couched as an inference Coleman's jury was not ever instructed as to the definition of an inference (the Montana Court's statutory definition of an inference as "indirect evidence as per 605 P.2d 1053, App. p. 126, was not in any instruction), or that the jury could disregard it or that even with this inference

that the jury was still required to find that Coleman acted "knowingly or purposely" beyond a reasonable doubt. The attempt below to do this by reference to a "circumstantial evidence" instruction given, 605 P.2d 1053, (App. p. 126), is just not appropriate. And the concluding statement on this issue below that "such inference standing alone would be insufficient unless it was inconsistent with any other hypothesis than guilt" 605 P.2d 1053 (App. p. 127), was not the law given this jury. This instruction was more critical than the one held unconstitutional in *Sandstrom* as this jury was told that all it had to do to convict was to "find that the defendant. . .committed a homicide."

Fundamental constitutional due process requires that the state must satisfy its burden of proof to the jury to find criminal intent in a homicide case, the specific intent to kill, beyond a reasonable doubt.

This instruction to convict then also was supported by the statutory definitions of "purposely" and "knowingly" which did not require the jury to find that Coleman had criminal intent, that Coleman had the specific intent to kill this victim, or even that Coleman had the purpose to kill or the knowledge that his act would kill.

In adopting its definitions on these terms, Montana did not follow the definitions from the Model Penal Code or from the Illinois or New York Penal Codes despite the statements by the Criminal Law Commission to this effect, and instead watered down these definitions to make it easier for a jury to find criminal intent, purpose or knowledge, and then compounded this with the instruction cited above.

Coleman's objections below to the Montana definition of "knowingly" were correctly summed up by the Montana Court at 605 P.2d 1055 (App. p. 128):

> "In trial court's instruction no. 26, the jury was told:
>
> ' "Knowingly". A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.
>
> "The objections to this instruction on rehearing are: (1) it violates the rule against reasonable doubt because it requires only a 'high probability of its existence;' (2) it is in effect an exclusive presumption in that the element is established if the jury finds a high probability of its existence; and (3) 'high probability' does not have that quality which would enable a jury to convict."

before that Court erroneously overruled this objection by reading into and adding the reasonable doubt requirement, which just is not present in this statute or the instruction.

The homicide defendant in Montana can be convicted without this Court's requirements noted in *U.S. v. Bailey*, ___ U.S. ___, 62 L.ed.2d 575, 100 S.Ct. ___, that:

> "Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind (and) an evil-doing hand. . .'
> Morissette v. United States, supra, at 251, 96 L.Ed. 288, 72 S.Ct. 240.
>
> . . .
>
> As we pointed out in United States v. United States Gypsum Co., 438 U.S. 422, 445, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978), a person who causes a particular result is said to act purposefully if ' "he consciously desires that result, whatever the likelihood of that result happening from his conduct(.)" ' while he is said to act knowingly if he is aware ' "that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." '
>
> . . .
>
> "In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the 'degree' of the crime or in imposing punishment,

> between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. See LaFave & Scott, supra, at 196-197."

Coleman's jury was never instructed that they must find beyond a reasonable doubt that he knew that another person would be killed as the result of his conduct and that he acted with the specific purpose of taking another's life.

CONCLUSION

Coleman requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

/s/ Charles F. Moses

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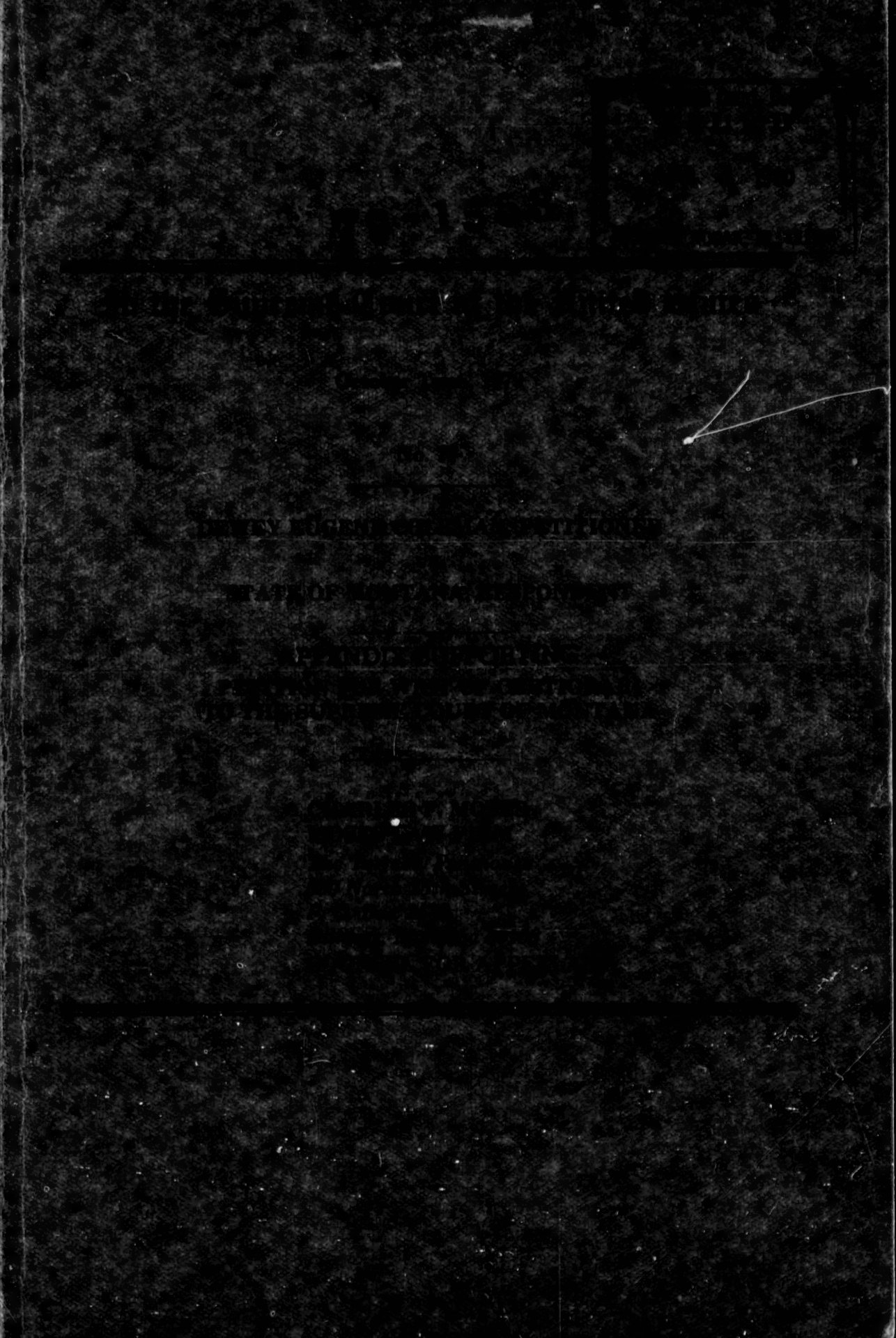
April 2, 1980

I certify that this Petition for Certiorari was served by mail on April 2, 1980 on Michael Greely, Montana Attorney General, Capitol, Helena, Montana 59601, and John Forsythe, Rosebud County Attorney, Courthouse, Forsyth, Montana 59327.

/s/ Charles F. Moses

CHARLES F. MOSES



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1. STATE V. COLEMAN, FIRST APPEAL

____M____, 579 P2d 732

No. 13296

The STATE of Montana, Plaintiff and Respondent,

v.

Dewey Eugene COLEMAN, Defendant and Appellant.

SUPREME COURT OF MONTANA

Decided April 26, 1978.
Filed April 26, 1978.
Rehearing Denied May 30, 1978.

HASWELL, Chief Justice.

Defendant appeals from the final judgement of the District Court, Rosebud County, following a jury trial. Defendant was convicted of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, inflicting bodily injury.

On July 4, 1974, Peggy Lee Harstad, 21 years of age, disappeared while driving alone from Harlowton to Rosebud, Montana. She was last seen alive around 9:00 p. m. that night at Melstone, Montana. On July 5, 1974, her car was found within a few miles of her home, near Rosebud. On July 7, 1974, a ranch hand discovered a purse and other articles belonging to Peggy Lee Harstad inside a culvert approximately ten miles west of her abandoned car.

In the developing investigation, an elderly couple informed the sheriff of Rosebud County that they had seen a black man and a white man hitchhiking on July 4 between Roundup and Forsyth, Montana at about the time of day Peggy Lee Harstad was driving between those towns. Subsequently, these two men were identified as the defendant, Dewey Eugene Coleman, a black man, and Robert Dennis Nank, a white man.

On July 9, 1974, representatives of the Rosebud County sheriff's office went to the Veteran's Administration Hospital in Sheridan, Wyoming, where these men were, to question them. Defendant and Nank admitted being in the area of Peggy Lee Harstad's disappearance and hitchhiking through Forsyth on the night of July 4th.

On August 6, 1974, the F.B.I. laboratory provided a positive comparison between a fingerprint lift taken from the exterior of the Harstad vehicle and a sample fingerprint of Nank. The F.B.I. also reported a positive comparison between a fingerprint of defendant and a lift taken from a paper found in Harstad's purse. In an interview with F.B.I. agents on August 1, 1974, defendant and Nank admitted seeing the Harstad vehicle abandoned on the road. When he was asked about his fingerprint in the purse, defendant stated that he found a purse along the road they were hitchhiking.

Vacuumings were taken in the Harstad vehicle. These were sent to the F.B.I. laboratory for analysis. They reported, on September 13, 1974, that Negroid head hairs were found in the loose hairs taken from the front seat. In addition, two Negroid pubic hairs were found in the vacuumings.

On August 29, 1974, the decomposed body of Peggy Lee Harstad was found on the north bank of the Yellowstone River, just west of Forsyth, Montana. A forensic pathologist, Dr. John Pfaff, identified the remains as Peggy Lee Harstad by the use of dental charts. Because of the state of decomposition of her remains, Dr. Pfaff could not determine a cause of death.

Since their original questioning in Sheridan, Wyoming, the defendant and Nank had moved to Boise, Idaho, sometime in August. At the request of Rosebud County authorities, the Boise police had kept these men under surveillance.

On October 16, 1974, the then Rosebud County attorney, William Meisburger, and Undersheriff Graham Makin went to Boise, Idaho to further interrogate defendant and Nank. The next day, October 17, 1974, Meisburger and Makin went to see the Boise police. They talked to Detective Brake of the Boise police about bringing the defendant and Nank to the police station for questioning. They informed him of all the evidence they

had connecting the defendant and Nank with the death of Peggy Lee Harstad. Detective Brake, since he had been doing some of the surveillance of the two men, knew about most of the evidence except about her body being found. After discussing the case with Meisburger and Makin, Detective Brake and a Detective Crowell went to the apartment where these two men were living. There the defendant and Nank were placed under arrest without a warrant for deliberate homicide in the death of Peggy Lee Harstad.

After their arrest and being placed in custody, arrest warrants and complaints were issued by a justice of the peace for Rosebud County. The warrants and complaint charged defendant and Nank with deliberate homicide.

Upon their arrest, defendant and Nank were advised of their rights. The defendant refused to waive his rights. Nank did waive his rights and, after being in custody for a few hours, gave a full confession. In his confession, he implicated himself and the defendant. He confessed that they kidnapped, raped, and murdered Peggy Lee Harstad. Nank consented to a search of their apartment and car for the murder weapons he said were used in the crime—namely, their motorcycle helmets and a rope. A search warrant was obtained and the helmets and rope recovered.

On October 24, 1974, a motion for leave to file an Information in the District Court, Rosebud County, was requested and granted. The Information charged the defendant with three counts: Count I, deliberate homicide; Count II, aggravated kidnapping; and Count III, sexual intercourse without consent, inflicting bodily injury. Defendant plead not guilty to all counts.

On January 30, 1975, defendant moved to suppress all confessions, statements and evidence, illegally seized. A suppression hearing was held. Following the disqualification of the trial judge by the State and the assignment of the case to another judge, a second suppression hearing was held and defendant's motion denied.

On May 7, 1975, the State entered into a written plea bargaining agreement with Robert Nank. Under the terms of the agreement, Nank agreed to plead guilty to deliberate homicide and

solicitation to commit sexual intercourse without consent, and further agreed to testify at defendant's trial in return for the dismissal of the aggravated kidnapping charge.

On May 19, 1975, defendant's then court appointed counsel made an oral offer of a conditional plea of guilty in return for dismissal of the aggravated kidnapping charge. On May 23, 1975, a written offer of a conditional plea of guilty was presented to the court. In this offer, defendant insisted on maintaining his innocence. The State refused to accept a guilty plea with defendant maintaining his innocence.

Following a change of defendant's court appointed counsel, a change of venue from Rosebud County to Custer County and finally to Yellowstone County, and other pre-trial proceedings and motions, defendant's trial commenced on October 23, 1975, in Yellowstone County.

At trial, Coleman and Nank related opposite statements of fact as to their involvement with Miss Harstad.

Nank testified that he and Coleman were traveling between Roundup and Forsyth on U. S. 12 on his motorcycle when they ran out of gas. They then tried to hitchhike. He said that one car stopped, but the elderly couple refused to give them a ride.

Nank stated that Miss Harstad stopped and gave them a ride. He testified that while driving down the road, he reached over and turned the key on her car off and steered the car to a stop. He stated that he put the girl in the back seat, took her clothes off, and attempted to rape her, but failed, while Coleman drove the car.

Nank testified that Coleman then raped her while he held her foot, testifying that he had a foot fetish. Nank said that they then went down by the Yellowstone River. He carried the girl, now fully clothed, over his shoulder, while Coleman came from behind swinging his silver motorcycle helmet by the chin strap and crashed it against her skull. Nank said that Coleman then took a yellow nylon rope and attempted to strangle her and asked Nank to help, but he did not strangle her. Then they took her down to the river and dumped her into it. As she was not dead, Nank held her head under water while Coleman held her legs.

Nank then testified that they drove her car back toward Forsyth until it ran out of gas. They removed some things from the car and walked into Forsyth. Nank left Coleman in Forsyth, hitchhiked with gas to the motorcycle, and returned to pick up Coleman. They then went to the V. A. Hospital in Sheridan where they stayed until going to Boise.

Defendant Coleman, on the other hand, testified that after the motorcycle ran out of gas and they were refused a ride, Nank suggested that because Coleman was black and there were few blacks in that area, he should go get the gas alone. Coleman testified that while he was sitting off the highway smoking, Nank got a ride.

After several hours, Nank returned in a car and, according to Coleman, Nank was wet, upset and acting strange. Coleman said he was told to get their things off the motorcycle and get in the car. When they both were in the car, Nank advised Coleman that he had killed a girl. The car ran out of gas, and they started to walk. Nank gave Coleman a purse to carry and later told him to get rid of it. Coleman threw the purse into a culvert. They then had breakfast in Forsyth, and Nank left Coleman while he went to get the motorcycle. Coleman also testified that Nank threatened him if he ever disclosed any of these facts.

The trial ended on November 14, 1975. The jury returned guilty verdicts on all three counts. On November 21, 1975, the court sentenced defendant Coleman to 100 years on Count I (deliberate homicide); to death by hanging on Count II (aggravated kidnapping); and to 40 years on Count III (sexual intercourse without consent inflicting bodily injury). Defendant's motion for a new trial was denied. A stay of execution has been granted pending this appeal.

Defendant raises 41 specifications of error on appeal. We will discuss these alleged errors within the broader context of the issue to which they relate.

We will restate the issues in this manner:

1. Whether the death penalty, imposed as defendant's sentence for conviction on Count II is constitutional?

2. Whether defendant should have been sentenced for 40 years on his conviction under Count III?

3. Whether defendant's motion to suppress the evidence obtained after his arrest should have been granted?

4. Whether defendant's conditional offer to plead guilty should have been accepted?

5. Whether defendant's motion to dismiss the three counts of the Information should have been granted and whether the Information should have been amended after defendant's entry of a plea?

6. Whether defendant's second jury challenge should have been sustained?

7. Whether the scope of the defendant's cross-examination of the State's witnesses was improperly limited?

8. Whether Nank's competency as a witness should have been determined prior to his testimony?

9. Whether defendant's motion to dismiss, at the close of the State's case, for lack of corroboration of Nank's testimony should have been granted?

10. Whether some of the State's witnesses were allowed to testify improperly to the prejudice of defendant?

11. Whether the District Court properly instructed the jury?

12. Whether certain State's exhibits were admissible and whether defendant's exhibits were properly refused?

13. Whether defendant's motion for a new trial should have been granted?

Issue 1. Defendant argues that his death sentence cannot stand because it is unconstitutional. He raises two claims. The first is that two jurors were excused for cause by the District Court based on their views of capital punishment. Defendant argues that this is in violation of *Witherspoon v. Illinois*, (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. His second claim is that Montana's death penalty statute, under which he was sentenced, is unconstitutional on its face.

[1] The *Witherspoon* rule is that a sentence of death cannot be carried out if the jury that imposed or recommended it was

chosen by excluding prospective jurors for cause simply because they voiced general objections to the death penalty. There is an exception to the rule. It provides that if a prospective juror is irrevocably committed to voting against conviction because of the possibility of a death penalty, he may be properly excluded for cause and a sentence of death carried out. In this case, defendant argues that *Witherspoon* makes his death sentence invalid as two jurors were improperly excluded. We disagree.

[2] We hold that the two prospective jurors in this case were properly excluded under the exception to the general rule of *Witherspoon*. One juror stated that no matter how strong the evidence of guilt was, he could not vote to convict if a death penalty could be imposed. The other juror stated that she felt she could not live with herself if she was on a jury that convicted a person and that person received a death sentence as a result. Thus, both of these jurors were irrevocably committed to voting against a conviction because defendant could receive the death penalty. Their being excused for cause because of their irrevocable commitment against the death penalty does not invalidate defendant's death sentence.

At the time of defendant's trial, the death penalty statute in Montana for aggravated kidnapping was section 94-5-304, R.C.M. 1947. It read:

> "A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as the result of the criminal conduct."

Defendant was sentenced to death under this statute.

This statute was repealed by the 1977 session of the state legislature. Section 16, Chapter 338, Laws of Montana 1977. The new death penalty statutes are codified as sections 95-2206.6 to 95-2206.15, R.C.M. 1947. The constitutionality of Montana's present death penalty statutes is not involved in this case.

Section 94-5-304, R.C.M.1947, as it existed in 1975, is a mandatory death penalty statute. In the light of recent U. S. Supreme Court decisions, this statute is unconstitutional on its face, and defendant's death sentence thereunder cannot stand.

In 1976, the United States Supreme Court, for the first time, ruled on the constitutionality of mandatory death penalty statutes. *Woodson v. North Carolina*, (1976), 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944. The statute before the Court was North Carolina's death penalty statute. It provided the death sentence for all persons convicted of first-degree murder. In holding this statute unconstitutional, the Supreme Court said:

> "* * * North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.' " *Woodson v. North Carolina*, 428 U.S. at 301, 96 S.Ct. at 2990, quoting from *Trop v. Dulles*, (1958), 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630.

In two later cases, the United States Supreme Court also held mandatory death penalty statutes unconstitutional. *Coker v. Georgia*, (1977), 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982; *Roberts v. Louisiana*, (1977), 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637. In *Coker* the Court held unconstitutional a Georgia statute requiring the imposition of the death sentence for rape, when one or more specified aggravated circumstances were found to be present. In *Roberts* the Court held unconstitutional a Louisiana statute requiring the imposition of a death sentence for killing a peace officer. Concerning the Louisiana statute, the Court said:

> "* * * it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow consideration of particularized mitigating factors, it is unconstitutional." *Roberts v. Louisiana*, 97 U.S. at 1996.

[3] The same problems that existed in the statutes declared unconstitutional in *Woodson*, *Coker*, and *Roberts* are present in the statute under which defendant was sentenced in 1975. It is a mandatory death penalty statute. Under this statute, if the court finds, as it did in this case, that the victim of an aggravated kidnapping died as a result of the crime, the convicted defendant must be sentenced to die. There is no provision for the trial court to consider any mitigating circumstances. It only allows the court to determine the aggravating circumstance of death. This is not constitutionally permissible.

To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. See: *Gregg v. Georgia*, (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, (1976), 428 U.S. 242, 96 S.Ct.2960, 49 L.Ed.2d 913; *Jurek v. Texas*, (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. None of those required procedures are present in Montana's death penalty statute as it existed in 1974, nor were they provided otherwise in this case. Thus, defendant's death sentence cannot stand.

Issue 2. Defendant was sentenced to 40 years for Count III, sexual intercourse without consent, inflicting bodily injury. This sentence was imposed pursuant to section 94-5-503(3), R.C.M.1947, which provides:

> "If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term of not less than 2 years or more than 40 years, except as provided in 95-2206.18."

Defendant argues that there was insufficient evidence to support the verdict that the defendant inflicted bodily injury upon Peggy Lee Harstad in the course of committing sexual intercourse without consent. Since that is so, defendant argues that his 40 year sentence is erroneous. We agree.

[4-6] The standard used to measure jury determinations is well settled in this state. *State v. Pascgo*, (1977), Mont., 566 P.2d

802, 34 St.Rep. 657. The rule is that questions of fact must be determined by the jury and given the required legal minimum of evidence, this Court on review will not substitute its judgment for that of the jury. *State v. Merseal*, (1974), 167 Mont. 409, 538 P.2d 1364. The evidence is examined to determine if there is substantial evidence to support the conviction when viewed in the light most favorable to the state. *State v. Pascgo*, supra; *State v. Merseal*, supra; *State v. Farnes*, (1976), Mont., 558 P.2d 472, 33 St.Rep. 1270. Applying these standards here, we find insufficient evidence to support the verdict that the defendant inflicted bodily injury in the course of committing sexual intercourse.

The evidence shows that defendant did commit sexual intercourse without consent. Nank testified that the defendant did so. Negroid pubic hairs were found in the car. However, Nank did not testify that defendant inflicted bodily injury upon Peggy Lee Harstad while engaged in sexual intercourse. The pathologist, Dr. Pfaff, specifically testified that he found no evidence of physical injury to Peggy Lee Harstad during his examination of the body.

The State argues that the evidence does show that Peggy Lee Harstad was killed following her rape. This, they say, fits the requirements of section 94-5-503(3), R.C.M. 1947, that bodily injury was inflicted in the course of the rape. We are unconvinced. To sustain a conviction for sexual intercourse without consent, inflicting bodily injury, there must be a showing of bodily injury as that term is defined in the criminal code, section 94-2-101(5), R.C.M.1947. That section reads:

> " 'Bodily injury' means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment."

There is no evidence showing that the defendant inflicted any such injuries on Peggy Lee Harstad. Thus, the verdict of the jury that defendant inflicted bodily injury in the course of committing sexual intercourse without consent is not supported by any evidence and cannot stand. Defendant should properly have been sentenced under section 94-5-503(2), R.C.M.1947, for committing sexual intercourse without consent.

Issue 3. Prior to trial, defendant moved to have suppressed the evidence seized in Idaho—the motorcycle helmets and the rope. He argues that his arrest without a warrant was unlawful because of a lack of probable cause to arrest. He contends that the State did not have probable cause to arrest him until after Nank's confession several hours after his arrest. He further claims that Nank's constitutional rights were violated because Nank's confession and consent to the search were involuntary. The District Court refused to suppress the evidence. Defendant maintains this was reversible error and raises the same arguments on appeal that he did in the suppression hearing.

[7] We find there was probable cause to arrest defendant without a warrant. The legality of an arrest is determined by the law of the jurisdiction where the arrest was effected. *Miller v. United States*, (1958), 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332. In this case, since the arrest took place in Idaho, Idaho law must be applied to determine the validity of the arrest. Detective Brake arrested defendant and Nank in Boise without a warrant for a deilberate homicide in Montana. Idaho's general arrest statute, section 19-603(3), I.C., provides in pertinent part:

> "A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
> "* * *
> "3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it."

An examination of Idaho law discloses no case determining whether a peace officer may arrest a person in Idaho for a crime committed elsewhere, without a warrant, by the authority given him in this statute.

Idaho, like Montana, has adopted the Uniform Criminal Extradition Act. There is a provision in that act for arrests without a warrant of fugitives from another state, which defendant and Nank are. This provision is section 19-4514, I.C., which reads as follows:

> "*Arrest without a warrant.*—The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged with a crime punishable by death or imprisonment for a term exceeding one (1) year in the courts of another state; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the last section; and thereafter his answer shall be heard as if he had been arrested on a warrant."

The courts in Idaho have not had occasion to interpret this statute.

Other jurisdictions have held that this provision of the Uniform Criminal Extradition Act implies the necessity of some prior court action in the state where the crime was committed, but the act is not intended to repudiate the common law rule that an arrest may be made on probable cause to believe the arrested person had committed a crime in another state irrespective of lack of complaint or warrant in their state. *Desjarlais v. State* (1976), 73 Wis.2d 480, 243 N.W.2d 453.

> "In some jurisdictions an officer has no authority to arrest without a warrant a fugitive from justice from another state, even on telegraphic or personal request of the officers of the demanding state. In other jurisdictions an arrest may be made by an officer without a warrant, at least under certain circumstances, as where the fugitive has committed a felony * *." 35 C.J.S. Extradition, § 12b.

There are matters left wholly to the individual states. *Burton v. New York Cent. R. R. Co.*, (1917), 245 U.S. 315, 38 S.Ct. 108, 62 L.Ed. 314. Thus, the inquiry must be whether or not Idaho recognizes the common law rule.

[8] In our view Idaho law recognizes the common law rule that an arrest may be made without a warrant where the arresting officer has probable cause to believe the person arrested has committed a crime in another state. Defendant's arrest was legal in this case as Detective Brake had probable cause to believe defendant had committed a felony in Montana. Under Idaho law, probable cause exists where there is such a state of facts as would lead a man of ordinary care and and prudence to believe or entertain an honest and strong suspicion that such person has committed a crime. *State v. Polson*, (1959), 81 Idaho 147, 339, P.2d 510; *State v. Loyd*, (1967), 92 Idaho 20, 435 P.2d 797. Here, Detective Brake knew Peggy Lee Harstad had disappered on the night of July 4, 1974. He knew defendant and Nank had been seen together in the area of her disappearance on that night. He knew their fingerprints had been identified on her car and purse. He knew Negroid head hairs and pubic hairs were found in her car and that defendant was a Negro. This constituted probable cause to arrest them.

Next we must look to see if the search of the apartment and car, where the helmets and rope were recovered, was lawful. We note that this search was not the product of defendant's and Nank's arrest. It was based on Nank's consent to the search. Defendant questions whether Nank's consent was freely given. However, defendant cannot assert any violations of Nank's constitutional rights.

[8] The rule in Montana is that a defendant does not have standing to challenge violations of constitutional rights of a co-defendant or third party by law enforcement authorities. *State v. Braden*, (1973), 163 Mont. 124, 515 P.2d 692. This rule is based on *Alderman v. United States*, (1969), 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. Therefore, we hold defendant cannot claim any violation of Nank's Fourth Amendment rights and his consent to the search made it a lawful search.

There was no error in the District Court's denial of defendant's motion to suppress.

Issue 4. Defendant claims the State refused to plea bargain with him or to accept his conditional plea of guilty because he is a black man. He claims it was because of his race that the State insisted upon having a full trial in this case, where, upon conviction, a death sentence could be imposed. He argues it is reversible error for the State not to plea bargain or to accept his offer to

plead guilty. How this would be so, defendant has not made clear to us.

[12, 13] We recognize that a defendant may plead guilty while maintaining his innocence, especially to avoid a death sentence. *Brady v. United States*, (1970), 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747; *North Carolina v. Alford*, (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. However, these cases deal with attempts to withdraw a guilty plea after it has been entered and deal with the voluntariness of the original plea of guilty. These cases do not require the trial court or the prosecution to accept a guilty plea. The acceptance of a guilty plea to a charged offense is within the discretion of the trial court.

[14] Accordingly, we find no error in the State's refusal to plea bargain with defendant or in the District Court's refusal to accept his conditional plea of guilty while maintaining his innocence.

Issue 5. Defendant contends the District Court erred in denying his motion to dismiss the Information for failure to state facts sufficient to constitute an offense. His argument is that section 95-1503, R.C. M.1947, relating to the form of a charge, requires that the charge to be in ordinary and concise language, and in such a manner that the defendant would know what was intended. He alleges that the Information in this case did not meet this requirement. Defendant premises his argument on the State's attempt to amend the Information after entry of defendant's plea. He alleges that the State, in attempting to amend the Information, admitted the Information was defective. The trial court refused to allow the Information to be amended. However, the court itself amended Count II, the aggravated kidnapping charge, to add the words: "resulting in the death of Peggy Lee Harstad."

[15, 16] We fail to see how the State's attempt to amend the Information aids the defendant in claiming the Information is not sufficient. The State by amending the Information was trying to make it a better Information. They were not claiming it was insufficient as it existed. An Information need only be sufficient to apprise the accused of the nature of the crime charged. It need not be perfect.

> "It is frequently stated, as a general rule, either with reference to statutory misdemeanors, or to statutory offenses generally, that a charge is sufficient which follows the language of the statute creating the offense; and it has been held that, if accused insists on greater particularity, it is incumbent on him to show that from the obvious intention of the legislature or known principles of law the particular case forms an exception to the general rule." 42 C.J.S. Indictments and Informations, § 139c.

[17] Montana follows this general rule. An Information that properly charges an offense in the language of the statute describing the offense is sufficient. *State v. Randall*, (1960), 137 Mont. 534, 353 P.2d 1054; *State v. Shannon*, (1933), 95 Mont. 280, 26 P.2d 360; *State v. Haley*, (1957), 132 Mont. 366, 318 P.2d 1084; *State v. Duncan*, (1957), 130 Mont. 562, 305 P.2d 761; *State ex rel. Glantz v. District Court*, (1969), 154 Mont. 132, 461 P.2d 193.

[18] We hold that the Information filed in this case was sufficient. Each count followed the language of the statutes for deliberate homicide, section 94-5-102, R.C.M.1947, aggravated kidnapping, section 94-5-303, R.C.M.1947, and sexual intercourse without consent, section 94-5-503, R.C.M.1947.

As for the amendment by the court to Count II, contrary to defendant's contention, we find that it was a proper amendment. Section 95-1505, R.C.M.1947, as it existed in 1975, allowed an Information to be amended as to form after entry of plea but not as to substance. Defendant argues that the amendment to Count II was one of substance. He claims that prior to this amendment, he was not subject to the death penalty. We disagree.

[19, 20] We recognize that any amendment to an Information which charges a crime different in penalty is a matter of substance and impermissible. *State v. Fisher*, (1927), 79 Mont. 46, 254 P. 872; *State v. Knight*, (1963), 143 Mont. 27, 387 P.2d 22. Here, however, the amendment was one of form. Defendant knew from the very beginning the death penalty was going to be sought. Prior to the amendment to Count II, the death penalty,

upon a conviction, could have been sought under either Count I or Count II. The amendment simply limited it to Count II. Furthermore, the record indicates that defendant was not surprised the death penalty was being sought. He objected to the amendment in the lower court, but he did not ask for any continuance as a result of it. He clearly knew prior to the amendment that the State was seeking the death penalty.

In any event, no legal prejudice resulted from the amendment of Count II in the light of our holding that Montana's death penalty statute as it existed in 1975 is unconstitutional.

Issue 6. On October 20, 1975, defendant filed a challenge to the jury panel claiming that it was not drawn and summoned in accordance with the jury selection statutes. The challenge was made in conformity with section 95-1908, R.C.M.1947, which states how a jury challenge is to be made. After a full hearing on the challenge, the District Court dismissed the jury panel.

The court then ordered a new panel of 60 jurors be drawn and summoned to appear for trial on October 23, 1975. Defendant raised a second jury challenge to this panel. He again argues that the panel was not drawn and summoned in accordance with the statutes. The court denied the challenge. Defendant, on appeal, claims his second jury challenge should have been granted. We disagree.

Basically, defendant raises three arguments concerning why the jury panel that tried him was improperly drawn and summoned. First, he says that there were more numbers in the jury box than names on the jury list. There were 55,763 numbers in the box and 44,765 on the list. When a number was drawn higher than 44,765, it was returned to the box. Defendant claims that having more numbers in the jury box than names on the jury list fails to substantially comply with the jury selection statutes and constitutes reversible error.

[21, 22] Section 93-1402, R.C.M.1947, requires that each name on the jury list be assigned a number. Section 93-1404, R.C.M.1947, requires that the numbers be placed in the jury box in such a manner that they cannot be distinguished from each other. Neither of these statutes require that there be only as many numbers in the jury box as names on the jury list except

there was more than one number for each juror. Therefore, we hold that having more numbers in the jury box than names on the jury list does not destroy the validity of the panel drawn. The purpose of these statutes is to insure that there be no unfairness in the selection of the jury. *State ex rel. Henningsen v. District Court*, (1959), 136 Mont. 354, 348 P.2d 143; *In re Jury Box Capsules*, (1967), 150 Mont. 583, 447 P.2d 687. We find no unfairness here in the drawing of the jury panel.

[23, 24] Second, defendant complains that the 200 jurors drawn were notified by telephone by the District Court clerk to see if they would be available for the trial on October 23, 1975. Sixty-one of those called replied they would be available. Defendant claims that, in effect, the District Court clerk excused 139 jurors, and that, under the law, the District Court clerk may not excuse jurors from jury duty. Further, defendant claims that the jurors were allowed to excuse themselves for slight or trivial cause in violation of the statute on being excused from jury duty.

Section 93-1512, R.C.M.1947, authorizes the District Court judge to draw and summon additional jurors for a trial when it is necessary to do so. This section further provides that the additional jurors may be notified by telephone by the clerk of court. In this case, after dismissing the first jury panel, additional jurors were needed. The District Court judge drew 200 numbers out of the jury box to get a 60 member jury panel. He authorized the clerk to orally notify the jurors. The clerk, as section 93-1512, R.C.M.1947, authorizes, notified the jurors by telephone. Thus, defendant's claim that notifying the jurors by telephone was improper is without merit.

Section 93-1305, R.C.M.1947, does deal with the grounds for being excused from jury duty. It provides that a juror may not be excused for slight or trivial cause. On the record that is before us, there is no showing that the clerk excused any of the jurors called. We note that the district judge had ordered the clerk to have a panel of 60 jurors for the trial on October 23, 1975, which he did. Further, the rule in Montana is that the failure of a juror to appear, if properly notified, will not invalidate a subsequent trial, as a defendant has no right to select a particular juror, but has only

a right to reject a juror. *State v. Moran*, (1963), 142 Mont. 423, 384 P.2d 777. Applying that rule to this case, we hold that defendant's trial should not be invalidated because 60 out of 200 jurors appeared which was the size of the panel ordered by the District Court.

Finally, defendant argues that the speed used in selecting the jury denied him his right to a fair and impartial jury panel. He argues that the jury panel did not represent a cross-section of the community as most of the jurors came from the west side of Billings, Montana.

[25, 26] The rule is that a defendant has a right to a fair and impartial jury selected from the proper place and drawn and summoned according to law. The systematic and intentional exclusion of a class of persons or a purposeful and deliberate design to secure the jury from a limited area instead of the entire county deprives a defendant of fundamental constitutional rights. *State v. Hay*, (1948), 120 Mont. 573, 194 P.2d 232. In *Hay* this Court found that the defendant failed to establish that he had been deprived of his right to have a jury taken from a cross-section of the county by showing that all members of the jury panel were residents of the county seat, in the absence of a showing that it was the result of deliberate design. In this case, there was no showing of deliberate design to get a jury panel from only the west side of Billings.

We hold that the jury was selected in substantial compliance with the law and that defendant's claim that he was denied a fair and impartial jury must fail.

Issue 7. Defendant claims error in improperly restricting his cross-examination of some of the State's witnesses. At the time of trial section 93-1901-7, R.C.M.1947, governed the scope of permissible cross-examination as to any testimony elicited on direct examination or facts connected therewith and all other facts connected with the witness's testimony which tends to enlighten the jury on the question in controversy. *State Highway Commission v. Bennett*, (1973), 162 Mont. 386, 513 P.2d 5.

[27] We have examined the District Court's rulings concerning cross-examination of State's witnesses Ash, Schiffer and Nank, and find no error. The questions asked were either

argumentative, immaterial or otherwise answered.

[28] Defendant also claims error in connection with his attempted cross-examination of State's expert witness Hippard from the F.B.I. laboratory concerning identification of the hairs taken from the Harstad vehicle and comparison of these hairs with defendant Coleman's hair. The District Court properly disallowed cross-examination of Hippard concerning his ability to identify hair from pictures as the witness testified that he could not look at a picture of a hair and identify it.

[29] Hippard testified on direct examination that the only way of identifying and comparing hair was by a comparison microscope which was the method he used. Although defendant offered to submit hair samples to Hippard, he did not specifically state how this would be done or offer to furnish a comparison microscope. The District Court did tell defendant to proceed with his cross-examination and that they were then through with the witness unless defendant himself called him on direct, which defendant did not do. The matter of permitting experiments, tests and demonstrations is one addressed to the sound discretion of the court. *State v. London*, (1957), 131 Mont. 410, 310 P.2d 571; *State v. Keller*, (1952), 126 Mont. 142, 246 P.2d 817; *State v. Thompson*, (1974), 164 Mont. 415, 524 P.2d 1115. We find no abuse of that discretion here under the offer of the defendant and the District Court's rulings.

Issue 8. Defendant assigns error in the District Court's denial of defendant's challenge to Nank's mental competency as a witness.

[30-32] A Montana statute provides that those of unsound mind cannot be witnesses. Section 93-701-3(1), R.C.M.1947. It is the function of the trial judge to determine the competency of a witness to testify. *State v. Newman*, (1923), 66 Mont. 180, 213 P. 805. There is no presumption that a witness is incompetent and the burden is on the party asserting the incompetency to prove it. *State v. Newman*, supra. This defendant did not do.

[33] Furthermore, if a witness is sufficiently competent to understand and appreciate the nature and obligation of an oath and can correctly narrate the facts involved in the case, he may testify and the state of his mentality goes only to the weight of

his testimony and not to its admissibility. *Martin v. Hover,* (1921), 60 Mont. 302, 199 P. 694.

We find no error by the District Court on the issue.

Issue 9. At the close of the State's case, defendant moved to dismiss the Information, or, in the alternative, for a judgment of acquittal for lack of corroboration of Nank's testimony. Corroboration of the testimony of one responsible or legally accountable for the same offense is necessary to sustain a conviction. Section 95-3012, R.C.M.1947. This statute requires corroboration by evidence which tends to connect the defendant with the commission of the offense, without the testimony of the person legally accountable or responsible. Defendant argues that there was not sufficient corroboration of Nank's testimony to sustain defendant's conviction. We disagree.

[34] The rule on corroboration is stated in *State v. Cobb,* (1926), 76 Mont. 89, 245 P. 265. In that case, we held that the corroborating evidence may be supplied by the defendant or his witnesses; it may be circumstantial evidence; it need not be sufficient to sustain a conviction or establish a prima facie case of guilt; and it need not be sufficient to connect the defendant with the crime but must tend to connect him with the crime. In *State v. Keckonen,* (1938), 107 Mont. 253, 84 P.2d 341, we held that where the alleged corroborative evidence is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of defendant, then such evidence does not tend to connect him with the commission of the offense and is in the realm of speculation, not corroboration. Where the claimed corroboration shows no more than an opportunity to commit a crime and simply proves suspicion, it is not sufficient corroboration to justify a conviction upon the testimony of an accomplice. *State v. Jones,* (1933), 95 Mont. 317, 26 P.2d 341.

[35] Applying those rules to this case, we hold there was sufficient corroboration of Nank's testimony to sustain defendant's conviction. The corroborating evidence is: The crack in defendant's motorcycle helmet; a hair of Peggy Lee Harstad being on the rope belonging to these men; the fingerprints on her car and in her purse; the Negroid pubic hairs similar to defendant's and

the Negroid head hair found in her car; and, the evidence that defendant and Nank were seen together on the same road and at approximately the same time that Peggy Lee Harstad disappeared. This evidence tends to connect defendant with the commission of the offenses charged. It is evidence of more than mere opportunity or suspicion that defendant committed these offenses. This evidence does not establish any reasonable explanation pointing toward innocent conduct. We find no error in the District Court's denial of defendant's motion.

Issue 10. On appeal, as at the trial, defendant raises objections to certain questions and answers elicited from the State's witnesses. He argues that these are cumulative errors requiring reversal. We do not agree.

[36] His first objection is to Nank's being allowed, on direct examination, to testify that he had told the same story concerning the crime to the police and the F.B.I. prior to the trial. Defendant claims that this testimony was used to buttress and fortify Nank's testimony before his testimony was challenged.

Basically, the questions to Nank were to find out if Nank was testifying to the truth. This Court has held in the past that the State may ask such questions on direct examination. *State v. Collett,* (1946), 118 Mont. 473, 167 P.2d 584. In *Collett,* this Court said the District Court did not commit prejudicial error in allowing the witness to answer a question as to whether he was testifying to the truth. The rationale is that while the answer is in the nature of a self-serving declaration, it is only a reaffirmation of what the witness promises to do when he takes the oath. We believe this approach is sound and will follow it here. We hold the questions and answers as to Nank's prior statements do not constitute prejudicial error.

[37, 38] Defendant then objects to an F.B.I. agent being allowed to testify about defendant's attitude in his interview with defendant at Sheridan, Wyoming. Specifically, the agent testified that defendant was evasive during questioning.

We agree that this was improper opinion evidence. However, technical errors or defects will not provide a basis for reversal in a criminal prosecution. *State v. Gallagher,* (1968), 151 Mont. 501, 445 P.2d 45. We hold that the admission of this testimony was only a technical error and is not a basis for reversal.

[39] Next, defendant argues that a F.B.I. fingerprint expert was allowed to testify on re-direct examination beyond the scope of cross-examination. The questions to which the defendant objected concerned the date on which the F.B.I. laboratory received certain fingerprint cards. The record reveals there was some confusion as to the dates various fingerprint cards were received. Under those circumstances, the District Court did not abuse its discretion in allowing the State to clarify the issue on re-direct.

[40] Finally, defendant objects to witness Makin testifying as to where he was told certain hairs came from. Defendant claims this was hearsay. An earlier witness, Ash, who was the declarant, testified as to where he found the hairs.

Here, Undersheriff Makin was testifying to establish the chain of evidence. He had received the hairs from Officer Ash, who told Makin he obtained the hairs from the abondoned Harstad vehicle. Thus, the declaration of Ash was a part of the chain of evidence.

We find no cumulative error in the testimony of the State's witnesses sufficient to warrant reversal.

Issue 11. Defendant objects to certain instructions which were given to the jury and offered instructions that were refused. We find the jury was properly instructed.

[41] Defendant's first objection is to Instruction 22. This instruction was that if the jury found defendant committed a homicide and no circumstances of mitigation, excuse or justification appears, they may infer that the homicide was committed knowingly and purposely. This instruction was based on section 95-3004(2), R.C.M. 1947. The instruction follows the statute. Defendant argues that instruction as a statutory presumption is unconstitutional, citing *Leary v. United States,* (1969), 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57. This case provides that to have a valid criminal statutory presumption, the presumed fact must more likely than not flow from the proved fact on which it depends.

We find this instruction and statute are constitutionally valid. The jury was instructed that they "may" find knowledge or purpose when there are no circumstances of mitigation, excuse, or justification. They are not required to find this. Thus, it is not a

conclusive presumption. The instruction and statute do not violate the *Leary* requirement because a finding of knowledge or purpose would more likely than not flow from the proved fact that a homicide was committed by defendant and where there were no circumstances of mitigation, justification, or excuse.

[42] Defendant objects to Instruction 26, which gave the statutory definition of "knowingly", and further objects that his offered Instruction 16, which dealt with criminal intent and premeditation, was not given. Instruction 26 was the statutory definition of "knowingly" as contained in section 94-2-101(27), R.C.M.1947. The portion of the statute and instruction defendant objects to is: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence." Defendant argues that this definition does not comply with the traditional requirements of criminal intent. That is why, according to defendant, his offered Instruction 16 should have been given as it explained the criminal intent and premeditation necessary for a conviction of deliberate homicide.

We believe there was no error in the court's giving of Instruction 26 and refusing to give defendant's Instruction 16. We have considered the necessity of instructing the jury on criminal intent and premeditation before. *State v. Sharbono,* (1977), Mont., 563 P.2d 61, 34 St.Rep. 196. In that case, we found no error in the District Court's refusal to give an instruction identical to defendant's offered Instruction 16. There, we held that the legislature had changed the requirements of mens rea. This Court said, in discussing the question of criminal intent:

> "Upon the whole it is the person who means to do the thing that constitutes a crime, knows he is doing it, and knows that there is a substantial and unjustifiable risk in doing it, whose conduct warrants condemnation of the kind from which conviction results." *Sharbono,* 563 P.2d at 72.

Therefore, we find the court properly instructed the jury as to the "knowledge" required for a conviction in Instruction 26 and properly refused defendant's Instruction 16.

[43] Defendant objects that his offered Instruction 10 was not given. This instruction deals with the burden of proof. It comes from *State v. Halk*, (1914), 49 Mont. 173, 141 P. 149.

The Court adequately instructed the jury concerning the burden of proof in Instruction 4. Thus, there is no error in refusing defendant's offered Instruction 10.

[44] Next defendant complains that his proposed Instruction 14 on reasonable doubt was not given. We believe the court rightfully refused this instruction since the jury was adequately instructed on reasonable doubt in the court's Instructions 5, 6, 7, and 10. Defendant's proposed instruction would have only been redundant, and therefore, was unnecessary.

[45] Defendant contends that his offered Instruction 34 should have been given. This instruction dealt with the jury not having to decide in conformity with the greater number of witnesses if their testimony does not produce conviction in their minds. Defendant argues that with the number of witnesses the State produced, he was entitled to this instruction. We disagree.

We must point out that the instruction defendant proposed was adequately covered in the court's Instruction 2. This instruction read in part:

> "You are not bound to decide in conformity with the declarations of any number of witnesses, not producing conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in this case."

This is a standard Montana Jury Instruction Guide instruction which correctly states the law. The District Court was correct in refusing defendant's offered Instruction 34 covering the same subject.

[46] Next, defendant alleges that his offered Instruction 35A should have been given. This instruction was on the lesser included offense of mitigated deliberate homicide.

Where there is no evidence of mitigation that would fit within the statutory definition of mitigated deliberate homicide, section

94-5-103, R.C.M.1947, the trial court should properly refuse to instruct on such crime. *State v. Baugh*, (1977), Mont., 571 P.2d 779, 34 St.Rep. 1315. In viewing the record here, we find no evidence of mitigation. This instruction was properly refused.

[47] Defendant also objects to Instruction 40. This instruction told the jury that sentencing was vested in the court and the jury was not to consider the possible punishment defendant could receive in reaching a verdict. Defendant's objection is that in this instruction, and in voir dire of the jury, the jury was led to believe that the judge had discretion in imposing the death penalty.

This instruction simply told the jury sentencing was up to the judge. The instruction does not state that the judge can mitigate punishment. It only says that he has the power to impose punishment, which is correct. It is where the jury is instructed as to the various possibilities of sentence that prejudice to the defendant exists. *State v. Zuidema*, (1971), 157 Mont. 367, 485 P.2d 952. This is not the case here. The instruction was proper.

[48] Finally, defendant objects to the special verdict form used on Count II. The jury was specifically asked to find if Peggy Lee Harstad died as a result of the aggravated kidnapping. The jury found that she did. Defendant argues that Montana law does not provide for specific factual findings by the jury.

The jury was given general verdicts asking for a finding of guilty or not guilty on each count. The jury was to make the additional finding that the element necessary for the imposition of the death penalty was present. Under those circumstances, this additional factual finding does not fall into the vice of a special verdict. It does not require a fact determination which could be used to undermine the general verdict. Thus, the verdict forms were permissible.

In any event, our holding on Montana's death penalty statutes renders this specification of error nonprejudicial.

Issue 12. Defendant objects to some exhibits which were admitted into evidence and some of his own which were refused admission.

His first objection is to State's Exhibit 20. This was a picture of the area in which Peggy Lee Harstad's body was found. In the picture, her decomposed body can be seen. Defendant argues that

this picture was prejudicial because it is a gruesome photograph. He claims that any relevancy of this photograph is outweighed by its prejudicial effect.

[49] This Court has held that photographs which help the jury understand the case are admissible, but photographs that are calculated to arouse the sympathies or prejudices of the jury are properly excluded. *State v. Bischert*, (1957), 131 Mont. 152, 308 P.2d 969. This Court went on to say in that case, that photographs may not be used if intended to inflame the minds of the jury rather than enlighten them as to the facts. We affirm the rule of the *Bischert* case, but reject its application to this case.

[50] In *Bischert*, the photograph was extremely distasteful and did not make a significant contribution to the development of the facts in that case. This is not the case here. We have examined the photograph and find that it is hazy, indistinct, and of poor quality. Any gruesome character that the photograph might otherwise possess is lost in its development and reproduction. The photograph is relevant in that it shows the jury the area in which the body was found; and it corroborates Nank's testimony as to her being fully clothed and as to where the body was. Under the circumstances here, the photograph's probative value outweighs its prejudicial effect.

Defendant objects to the admission of two other photographs, namely State's Exhibits 41 and 43. There were pictures of the apartment building and the parking lot in Boise, where defendant and Nank were arrested. Defendant argues that these photographs were irrelevant and cumulative evidence.

[51, 52] As a general rule, photographs, when relevant to describe a person, place or thing, are admissible for the purpose of explaining and applying the evidence and assisting the court and jury in understanding the case. *Fulton v. Chouteau County Farmers' Co.*, (1934), 98 Mont. 48, 37 P.2d 1025. The photographs of the apartment building and parking lot helped to describe the place where the defendant and Nank were arrested. These photographs showed where the helmets and rope were recovered. These photographs assisted the jury in understanding the arrest and search in Boise. They were properly admitted.

[53] Defendant also objects to the admission of Nank's motorcycle helmet into evidence. His complaint is that the chain of evidence was not established prior to the admission of the helmet and further complains that he was not allowed to voir dire Nank prior to its admission. Defendant states there was a problem with the chain of evidence in that this helmet was labeled as belonging to defendant and not Nank.

Since Nank, prior to the admission of the helmet, positively identified it as his, we find the chain of evidence established prior to its admission. The mismarked label is of no consequence as the label was not admitted into evidence. We recognize that defendant might have been allowed to voir dire Nank prior to the admission into evidence of the helmet but such was not required. There is no indication that such a voir dire would have produced a different result. At most, only a procedural error not affecting the merits was involved, and not a prejudicial error requiring reversal. *State v. Heiser*, (1965), 146 Mont. 413, 407 P.2d 370.

[54] Defendant further claims error in admitting in evidence the waiver of rights form given to defendant in Boise, which he refused to sign. Defendant claims this exhibit was irrelevant and should have been excluded as cumulative evidence.

We can find no error in the admission of this exhibit. This exhibit aided in the jury in understanding the events of this case that occurred in Boise, Idaho. It supported the testimony of the Boise detectives as to the date of the arrest, the time of the arrest, and that defendant was informed of his constitutional rights. The exhibit was properly admitted.

[55] Defendant objects that his Exhibits V, W, X and Y were refused. These exhibits were pictures of the State's fingerprint photos. They were enlargements and an overlay of them was made. By use of the overlay, defendant wanted to show any differences in the fingerprints.

Our review of the record indicates that defendant did not lay a foundation, prior to moving for the admission of his exhibits, showing that fingerprints could be compared in the manner defendant was attempting to compare them. What defendant wanted to do was to show the jury by actual measurement the difference in the distance between the ridges between a known

print of defendant and the print found in Peggy Lee Harstad's purse. A fingerprint cannot be compared in this manner. The same fingerprint will produce differing results with respect to a measurement between the ridges depending upon the pressure applied in making the print and the manner in which the print was left upon the surface. Fingerprints are compared by determining if the same ridge characteristics are present in a known print and unknown print. These ridge characteristics will not vary between the different ways in which an impression is made on a surface.

[56] The rule is that the determination of whether a proper foundation has been laid in order to introduce exhibits into evidence rests with the lower court and its determination will not be overturned unless there is a clear abuse of discretion. *State v. Olsen*, (1968), 152 Mont. 1, 445 P.2d 926. Here the District Court properly excluded the exhibits because no proper foundation was laid for their admission.

[57] Finally, defendant claims that the court erred in refusing his Exhibit T showing some calculations as to the height of the water level in the Yellowstone River on July 4, 1974.

This exhibit was to aid defendant's argument that Peggy Lee Harstad was not drowned in the river as Nank testified she was. Defendant was trying to prove that the river, on July 4, 1974, was too deep, in the area where the body was found, for Nank and defendant to be holding her under the water. This exhibit was not admissible because of a lack of a proper foundation. Our review of the transcript reveals that the witnesses who prepared this exhibit were never shown to have the qualifications to prepare such an exhibit; it was not made clear how they arrived at the calculations they made of the height, flow, and volume of the river; and, it was not established that their calculations of the height of the river on July 4, 1974, were competent. Under such circumstances, there was no error in denying this exhibit admission in evidence.

[58] Issue 13. Following his conviction, defendant moved for a new trial. One of the grounds defendant raised was that after both sides had rested their case, defendant was contacted by a witness who knew of defendant's good conduct and character. Defendant argues that this newly discovered evidence is grounds for a new trial under section 95-2101, R.C.M.1947.

> "It is well-settled that a new trial will not be granted upon the ground of newly discovered evidence where it appears that such new evidence can have no other effect than to discredit the testimony of a witness at the original trial. It is only when it is shown by competent and satisfactory evidence that appellant would not have been convicted, but for this evidence, that a new trial will be granted for newly discovered evidence. (Citations omitted.)" *State v. Schleining*, (1965), 146 Mont. 1, 17, 403 P.2d 625.

In this case, defendant's newly discovered evidence would only go to discredit Nank's testimony and defendant has not shown that this evidence would make the difference between his being or not being convicted in a new trial. Under those circumstances, we will follow the general rule in finding no error in the denial of defendant's motion for a new trial.

We have examined the subsidiary contentions of defendant and find that none would change our holdings in this case or merit special discussion in this opinion.

The judgement of conviction on all three counts is affirmed. The sentences imposed for Counts II and III are vacated. The case is remanded to the District Court for resentencing on Counts II and III.

DALY, J. and L. C. GULBRANDSON,* District Judge, concur.

HARRISON, Justice, concurring in part and dissenting in part.

I concur in the opinion but dissent as to the majority's disposition of Issue 2. The majority finds no substantial evidence to support the jury's determination that defendant inflicted bodily injury in the course of committing sexual intercourse without consent. Section 94-5-503(3), R.C.M.1947, provides:

> " * * * if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in

> the state prison for any term of not less than 2 years or more than 40 years, except as provided in 95-2206.18."

The majority freely admits "the evidence shows that defendant did commit sexual intercourse without consent" and the jury so found. Nor is there any quarrel that there is substantial evidence showing that defendant participated in the killing of Peggy Lee Harstad. These facts were proven to the jury despite the fact, as the majority notes, the pathologist could find no evidence of physical injury to her badly decomposed body. While the majority is unclear in what respect the State's proof was lacking, the State must have failed to prove either that (1) defendant inflicted "bodily injury" on the victim, or (2) the bodily injury was inflicted in the course of the commission of the rape.

Undoubtedly, there is substantial evidence that defendant inflicted bodily injury on the victim. As noted above, the evidence indicates defendant participated in causing her death. Certainly death is "bodily injury" within the meaning of the statute. That death is "impairment of physical condition" is so obvious that it deserves little comment. Section 94-2-101(5), R.C.M.1947. To hold otherwise would lead to absurd results. For example, a person who breaks the arm of the victim in the course of committing a rape can receive a 40 year sentence for the rape, but a rapist who kills the victim can receive no more than a 20 year sentence for the rape. I cannot believe the legislature intended that a rapist receive a lighter sentence because he did more harm to the victim than is required by the definition of "bodily injury.".

If death is, indeed, bodily injury, the only remaining requirement is that the death be inflicted "in the course of committing sexual intercourse without consent". This phrase is explained in section 94-5-503(4), R.C.M.1947:

> "An act 'in the course of committing sexual intercourse without consent' shall include an attempt to commit the offense *or flight after the attempt or commission.*" (Emphasis added.)

Clearly there is substantial evidence to show the victim was killed in the "flight after" the commission of the rape. According

to Nank's testimony, she was raped in her car, and then beaten and drowned nearby. Had she lived, she would have been able to identify defendant and Nank as the perpetrators. The jury certainly would have been reasonable to infer that she was killed in an attempt to cover up the commission of the rape. The majority completely ignores the "flight after" language of the statute.

In the summary, I find substantial evidence to support the jury's verdict that defendant inflicted "bodily injury" upon the victim "in the course of committing sexual intercourse without consent". Her death supplied all the "bodily injury" required. Her death was inflicted in the course of committing the rape because it was an integral part of the flight after the commission of the offense. This is precisely the type of conduct the statute was intended to punish to the most severe extent.

I would affirm the imposition of the 40 year sentence.

SHEA, Justice, dissenting:

I agree with the majority opinion holding section 94-5-304, R.C.M.1947, to be unconstitutional. Clearly, the United States Supreme Court has prohibited mandatory death penalties because there is no allowance for consideration of mitigation. However, I would go yet another step and reverse the conviction because the second jury panel was not chosen in substantial compliance with the applicable statutes of calling in a new jury array. In fact, there was a complete failure to follow sections 93-1501 and 93-1509, R.C.M.1947.

The majority proceeds with this issue as though the District Court was only calling in additional jurors to complement the jury panel already legally in existence. The law involved is contained in Title 93, Chapter 15, entitled "JURORS—DRAWING AND SUMMONING FOR COURTS OF RECORD." Section 93-1512, R.C.M.1947, upon which the majority relies, is but one of the statutes covering the selection of juries. That section provides:

> "*Obtaining additional jurors when necessary.* Whenever it appears to a district judge that *additional jurors will be needed* for any term or trial the

judge shall *draw as many numbers* from the jury box [No. 1] *as are necessary to secure the required number of additional jurors.* Before drawing the numbers, the judge shall by appropriate order designate the number of jurors needed, and when the judge believes that securing the additional jurors from all of the county would cause unnecessary delay or expenses, [then] he may order the jurors selected from only a designated portion of the county, which portion shall never be less than the corporate limits of the county seat. If, in the selection of the additional jurors, a number is drawn and the jury list shows the person represented by the number to be a resident of an area outside the area designated by the court order, then that number shall be returned to the jury box and a new number drawn. When the required number of names have been selected, the judge may order the prospective jurors notified by telephone by the clerk of the court or he may order them summoned by the sheriff either by certified mail or by personal service." (Emphasis added.)

This statute allows additional jurors to be summoned by telephone (as one of the means of summoning a juror) where the jury array, then legally in existence, is not sufficient in number to complete the work of the court during the term of court. It does not apply where the legal existence of a jury array has been successfully challenged and it therefore becomes necessary to summon an entirely new jury panel—precisely what occurred in this case. The entire jury panel was excused because it was not summoned in compliance with the applicable statutes. The majority recognizes that this happened by stating:

> "* * * On October 20, 1975, defendant filed a challenge to the jury panel claiming that it was not drawn and summoned in accordance with the jury selection statutes. The challenge was made in conformity with section 95-1908, R.C.M.1947, which states how a jury challenge is to be made. After a full hearing on the challenge, *the District Court dismissed the jury panel.*" (Emphasis added.)

Clearly, upon this dismissal, the jury panel was no longer legally in existence. If any more cases were to be tried during that jury term, an entire new jury panel had to be summoned. In such case sections 93-1501 and 93-1509, R.C.M.1947, come into play. Section 93-1501, "Summoning of trial jury", provides:

> "At least once each year in each county, when a civil or criminal case has been at issue and ready for trial for more than six (6) months and the plaintiff or defendant in such case has requested a jury trial *or whenever the business of a district court requires the attendance of a trial jury for the trial of civil or criminal cases, and no jury is in attendance, the court must make an order directing a trial jury to be drawn and summoned to attend before said court.* Such order must specify the number of jurors to be drawn, and the time at which the jurors are required to attend, which time may be at the same term in which the jurors are drawn, or at the next succeeding term, in the discretion of the court. And the court may direct that such causes, either criminal or civil, in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance." (Emphasis added.)

Thereafter, the statutes providing for the mechanics of selecting a jury panel (sections 93-1503 et seq.) are followed until the requisite number of jurors is chosen from the jury list and jury boxes. After this is done, the jurors are then summoned in the manner as provided in section 93-1509, which provides:

> "*The sheriff,* as soon as he receives a list or lists of jurors drawn, *shall summon the persons named therein* to attend the court at the time mentioned in the order, *by a written notice by certified mail* to that effect addressed to them to the post office address named in the jury list and deposited in the

post office with the postage thereon prepaid, *except in cases where the district judge expressly directs that such service shall be made by giving personal notice,* and shall return the list to the court at the opening of the regular session thereof, or at such session or time as the jurors may be ordered to attend, specifying the names of those who are summoned, and the manner in which each person was notified." (Emphasis added.)

There can be no question that sections 93-1501 and 93-1509 must be followed in circumstances where a jury panel is not already legally in existence. Section 93-1512 applies only where for some reason there are not sufficient numbers on the original panel to complete the business of the court for the particular term involved. Here, the District Court entirely ignored sections 93-1501 and 93-1509 and the majority has approved this bypass. The procedure actually used by the District Court is fraught with dangers and is hardly the procedure to be approved for summoning an entire jury panel when a man is on trial for his life.

Here, a District Court, after dismissing an entire jury panel for procedural irregularities in the summoning process, commits an error equally as grave in allowing the clerk of court to obtain sixty willing jurors by calling them on the telephone.

We have no idea of the actual number of jurors called before sixty of them agreed to sit. We do not know the exact procedure used by the clerk in calling the jurors. Did he go down the list alphabetically and continue calling until he obtained the required number of jurors? Did he call jurors in areas of Yellowstone County where, from previous experience, he determined it would be most likely to get an affirmative response? Did he in fact call most of the jurors first who lived on the west side of Billings, commonly known to be the area where "successful people live? What did the clerk of court tell each person when he called? What excuses did the potential jurors give for not appearing? Did the clerk tell the jurors what excuses would be permissible? We will never know the answers to these questions. Of one thing, however, I am certain. If it so happened that the sixty jurors ultimately serving were a true cross-section of the residents of

Yellowstone County, it was an accident. It did not occur because the District Court scrupulously followed the law. Under these circumstances, it is a travesty to allow the conviction to stand.

In *State v. Fitzpatrick,* (1977), Mont., 569 P.2d 383, 388, 34 St.Rep. 736, 740, this Court stated:

> "This Court has long held the accused in a criminal prosecution is constitutionally guaranteed a trial by an impartial jury *selected and drawn in accordance with the law. State ex rel. Henningsen v. District Court,* supra; *State v. Hay,* 120 Mont. 573, 194 P.2d 232; *Dupont v. McAdow,* 6 Mont. 226, 9 P. 925. *Any material deviation or departure in procuring a jury has been held to constitute a denial of fundamental constitutional rights. State v. Porter, supra* [125 Mont. 503, 242 P.2d 984]; *State v. Groom,* 49 Mont. 354, 141 P. 858; *State v. Tighe,* 27 Mont. 327, 71 P. 3; reversed on other grounds 35 Mont. 512, 90 P. 981." (Emphasis added.)

In the present case there was not only a material departure in procuring a jury, there was a total failure to follow the applicable law. Clearly, the defendant has been denied a fundamental constitutional right.

For the foregoing reason I would reverse defendant's conviction and order a new trial.

2. STATE V. COLEMAN, SECOND APPEAL

and on Petition granted for rehearing

____M____, 605 P2d 1000

STATE of Montana, Plaintiff and Respondent,

v.

Dewey Eugene COLEMAN, Defendant and Appellant.

No. 14448.

Supreme Court of Montana.

Decided June 20, 1979
Filed June 20, 1979
On Rehearing Dec. 19, 1979.

SHEEHY, Justice.

[1] This matter comes before the Montana Supreme Court from the District Court, Sixteenth Judicial District, Rosebud County, under the automatic review provisions of sections 95-2206.12 through 95-2206.15, R.C.M.1947, now sections 46-18-307 through 46-18-310 MCA. In felony convictions not involving the imposition of the death penalty, it is the function of this Court to review the record and determine if any errors have been committed resulting in the imposition of an illegal sentence, while it is the function of the Sentence Review Division to determine if a legal sentence is appropriate in the circumstances. *State v. McKenzie* (1978), Mont., 581 P.2d 1205, 1229, 35 St.Rep. 759, *State v. Simtob* (1969), 154 Mont. 286, 462 P.2d 873, 874; sections 46-18-901 to 905 MCA. However, when the death penalty has been imposed, the Legislature has directed this Court, because of the nature of the penalty involved, to undertake expeditiously both functions. Sections 46-18-307, —308 MCA; Minutes of State Senate Judiciary Committee, January 28, 1977. We recognize that in *McKenzie* the Sentence Review Division

was allowed to conduct a review of the death penalty imposed, however, the defendant in *McKenzie* was sentenced under statutes different from those involved in this appeal. 581 P.2d at 1227. Because the review conducted by this Court statutorily stands in place of any recourse to the Sentence Review Division, the completion of this review will mark the end of state action upon this cause, excepting any action upon a petition for rehearing.

Defendant, Dewey Eugene Coleman has been sentenced to death for the crime of aggravated kidnapping under a judgment and order entered by the District Court, July 10, 1978.

The facts on which Dewey Eugene Coleman was found guilty by a jury on November 14, 1976, are set out in his earlier appeal to this Court, which we decided April 26, 1978. *State v. Coleman* (1978), Mont., 579 P.2d 732, 35 St.Rep. 560. We need not repeat those incidents here.

Defendant had been convicted of the crimes of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, violations of section 94-5-102, 94-5-303, and 94-5-503, R.C.M.1947, now sections 45-5-102, 45-5-303, 45-5-503 MCA. By our decision in the *Coleman* appeal, we remanded the case to the District Court for resentencing on count II, aggravated kidnapping, and count III, sexual intercourse without consent. The judgment of conviction on Count I, deliberate homicide and the sentence thereupon imposed, were affirmed.

The District Court on remand set a sentencing hearing "in accordance with section 95-2206.06 through 95-2206.11, R.C.M., as amended" for June 14, 1978. At that hearing, the court denied a motion of defendant to quash and ordered the presentence report be filed. Neither party presented any witnesses or other evidence.

Thereafter the court set July 10, 1978 as the date for sentencing. On that date, the District Court handed counsel for defendant and the State, a copy of its written findings, judgment and order. After argument was presented, the District Court then signed and filed its findings; judgment and order.

The District Court found and concluded that the aggravating circumstances set forth in section 95-2206.8(7), R.C.M.1947, existed because the offense of aggravated kidnapping had been

committed by defendant and it had resulted in the death of the victim, Miss Peggy Harstad; that none of the mitigating circumstances listed in section 95-2206.9, were sufficiently substantial to call for leniency in this case; and that the only mitigating circumstance technically present was that the defendant had no record history of prior criminal activity.

By reason of his findings and conclusions, the District Court ordered that the defendant Dewey Eugene Coleman be hanged between the hours of 6:00 a. m. and 6:00 p. m. on the 31st day following the completion of the automatic review of his case by this Court, said execution to be supervised by the sheriff of Yellowstone County. The District Court further ordered that defendant be sentenced to a term of 20 years for the crime of sexual intercourse without consent, and that such sentence be served consecutively to his sentence of 100 years for deliberate homicide, which had previously been assessed against the defendant and which was not disturbed on his appeal.

As a result of his trial in November 1975, defendant was then sentenced by the District Court to 100 years on count I, deliberate homicide; to death by hanging on count II, aggravated kidnapping; and to 40 years on count III, sexual intercourse without consent inflicting bodily injury. One of the questions decided by this Court on the first *Coleman* appeal was that his sentence of death by hanging was invalid under the statutes then in effect.

At the time of defendant's trial, the death penalty statute in Montana for aggravated kidnapping was section 94-5-304, R.C.M.1947. It read:

> "A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds the victim is dead as the result of the criminal conduct."

Defendant was sentenced to death under this statute.

Section 94-5-304 which had been enacted in 1973 (Ch. 513, Laws of Montana (1973)) and amended in 1974 (Ch. 126, Laws of Montana (1974)) was repealed by the 1977 session of the State

Legislature (Ch. 338, Laws of Montana (1977)). In the same enactment new death penalty statutes were codified in sections 95-2206.6 through 95-2206.15, R.C.M.1947, now sections 46-18-301 through 46-18-310 MCA.

In the first *Coleman* appeal, we held that because former section 94-5-304, mandatorily imposed the death penalty, it was constitutionally impermissible under United States Supreme Court decisions in *Woodson v. North Carolina* (1976), 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *Coker v. Georgia* (1977), 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982; and *Roberts v. Louisiana* (1977), 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637. This Court thereupon held that the death penalty assessed against defendant on November 21, 1975, must be set aside and, for reasons not important here, that the 40 year sentence on the count of sexual intercourse without consent must also be set aside. We remanded the case to District Court for resentencing on the counts of aggravated kidnapping and sexual intercourse without consent, without instructions to the District Court as to which law was applicable with respect to the resentencing of the defendant.

When the cause was received by the District Court on remand, the District Court determined that it would apply the new sentencing statutes that included the death penalty. The District Court then used the 1977 statute to assess the death penalty against defendant.

Defendant raises 19 specifications of error in this appeal. We will discuss these alleged errors within the broader context of the issue to which they relate. We frame the issues presented in this review in the following manner:

1. Did defendant's conviction on the count of deliberate homicide and the count of aggravated kidnapping constitute double jeopardy?

2. Were the present Montana capital punishment provisions, sections 95-2206.6 through 95-2206.15, R.C.M.1947, now sections 46-18-301 through 46-18-310 MCA applicable in resentencing defendant?

3. Do Montana's capital punishment provisions violate constitutional standards?

4. Was defendant denied a fair opportunity to present argument and evidence with respect to sentencing?

5. Is defendant's sentence of death disproportionate to his crime with respect to sentences imposed in similar cases, or was it the product of passion, prejudice or other arbitrary factors?

6. If the capital punishment provisions are valid and applicable, must this Court, in its review of the sentence, reconsider issues raised and disposed of in defendant's first appeal?

[2-4] We first address the issue raised by defendant that his conviction of aggravated kidnapping, in light of his conviction of deliberate homicide based upon the felony of kidnapping, has placed him twice in jeopardy. Defendant contends the aggravated kidnapping conviction is barred by the Fifth Amendment to the United States Constitution and the 1972 Montana Constitution, Art. II, § 25. Defendant also argues this conviction is barred statutorily by section 95-1711, R.C.M.1947, now section 46-11-501, -502 MCA.

The Fifth Amendment to the Federal Constitution states no person shall "be subject for the same offense to be twice put in jeopardy . . ." The 1972 Montana Constitution Art. II, § 25, states "No person shall be again put in jeopardy for the same offense." Defendant has been subjected to but one trial, however, these double jeopardy provisions also protect offenders from multiple punishment for the same offense. *Ex Parte Lange* (1873), 85 U.S. (18 Wall.) 163, 173, 21 L.Ed. 872; *Matter of Ratzlaff* (1977), Mont., 564 P.2d 1312, 1316, 34 St. Rep. 470.

Defendant has contended his conviction on the count of deliberate homicide is upon the same set of facts as his conviction on the count of aggravated kidnapping, thus he has been exposed to double jeopardy. We determine the prohibition against double jeopardy has not been violated in this case.

Count I of the information charging defendant reads as follows:

> "*Count I:* That the defendant purposely and knowingly caused the death of another human being, to-wit: Peggy Lee Harstad, while engaged in the commission of the following felonies:
> "Kidnapping and Sexual Intercourse Without Consent, involving the use of physical force and violence against the said Peggy Lee Harstad."

Count II of the information reads as follows:

> "*Count II:* That the defendant knowingly and purposely and without lawful authority restrained another person, to-wit: Peggy Lee Harstad, by holding her in a place of isolation and by using physical force to facilitate the Commission of a felony, to-wit: Sexual Intercourse Without Consent and for the purpose of inflicting bodily injury on and terrorizing the said victim, Peggy Lee Harstad, resulting in the death of Peggy Lee Harstad."

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306:

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, *the test to be applied* to determine whether there are two offenses or only one *is whether each provision requires proof of an additional fact which the other does not* . . ." (Emphasis added.)

As the United States Supreme Court noted in *Brown v. Ohio* (1977), 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187, this test emphasizes the elements of the two crimes. Rejecting a defendant's claim of double jeopardy, this Court stated in *State v. Davis* (1978), Mont., 577 P.2d 375, 35 St.Rep. 381, " 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the

defendant from prosecution and punishment under the other.' " 577 P.2d at 377. (Quoting from *Morey v. Commonwealth* (1871), 108 Mass. 433). Thus, our inquiry in the present appeal is directed to the elements of proof necessary to establish each count of the information.

To establish count I of the information the prosecution had to prove the defendant (1) purposely and knowingly (2) caused the death of another human being (3) while committing the felonies of kidnapping and (4) sexual intercourse without consent. To establish count II of the information the prosecution had to prove the defendant (1) knowingly and purposely (2) without lawful authority (3) restrained another person by holding her in a place of isolation and by using physical force (4) to facilitate the commission of sexual intercourse without consent and (5) for the purpose of inflicting bodily injury on and terrorizing the victim. Both counts required proof of a "purposely and knowingly" mental state, proof of kidnapping and proof of sexual intercourse without consent. However, count I, in addition, required proof of the death of the victim which count II did not; and count II required proof of a purpose to inflict bodily injury and terrorize the victim which count I did not. The offenses of deliberate homicide (former section 94-5-102, R.C.M.1947, now section 45-5-102 MCA) and aggravated kidnapping (former section 94-5-302, R.C.M.1947, now section 45-5-302 MCA) are separate and distinct offenses in our codes and each requires proof of elements the other does not. Therefore, defendant may be convicted and sentenced for both count I and count II of the information without violating the double jeopardy prohibition even though the counts arose from the same conduct or episode. *Brown*, 432 U.S. at 166, 97 S.Ct. 2221; *United States v. Eagle* (8th Cir. 1978), 586 F.2d 1193, 1196 (defendant's conviction of assault with a deadly weapon and assault resulting in serious bodily injury each arising from same shooting incident affirmed); *Kowalski v. Parratt* (8th Cir. 1976), 533 F.2d 1071, 1073-74 *cert. den.* 429 U.S. 844, 97 S.Ct. 125, 50 L.Ed.2d 115 (conviction of robbery and using a firearm in commission of same robbery affirmed); *Smith v. Gaffney* (10th Cir. 1972), 462 F.2d 663, 665-666 (conviction of burglary and larceny based upon same transaction affirmed); *Davis*, 577 P.2d at 377.

Arguments made by defendant in this appeal were also made by the defendant in *Williams v. Oklahoma* (1959), 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516. There the defendant had kidnapped and murdered his victim. He pled guilty to the murder charge and received a life sentence. Defendant was then charged with kidnapping, pled guilty and received the death penalty after the sentencing court considered the homicide as an aggravating circumstance. Defendant challenged the death sentence on the grounds it constituted a second punishment for the same crime. The United States Supreme Court rejected defendant's claims stating Oklahoma law clearly made kidnapping and homicide separate and distinct offenses; therefore there was no merit in the argument that the "lesser crime" of kidnapping "merged" into the "greater crime" of murder so as to bar any sentence, or at least a greater sentence than was imposed for the homicide. 358 U.S. at 587, 79 S.Ct. 421. The Court also stated:

> "[T]he Due Process Clause of the Fourteenth Amendment does not, *nor does anything in the Constitution, require a State* to fix or impose any particular penalty for any crime it may define or *to impose the same* or *'proportionate' sentences for separate and independent crimes.* Therefore we cannot say that the sentence to death for the kidnapping, which was within the range of punishments authorized for that crime by the law of the State, denied to petitioner due process of law *or any other constitutional right.*" 358 U.S. at 586, 79 S.Ct. at 427. (Emphasis added.)

We conclude defendant's conviction of both count I, deliberate homicide, and count II, aggravated kidnapping, did not transgress any constitutional inhibitions, federal or state, against double jeopardy.

Defendant has also argued his aggravated kidnapping conviction is barred by the operation of section 95-1711(2), R.C.M.1947, now section 46-11-502 MCA. Defendant argues the aggravated kidnapping count is an "included offense" in the count of deliberate homicide and he therefore may not be, under section

95-1711(2)(a), now section 46-11-502(1) MCA, convicted of that count. Section 95-1711(1)(b), R.C.M.1947, now section 46-11-501 (2)(a) MCA, defines "included offense" in pertinent part as an offense "established by proof of the same or less than all the facts required to establish the commission of the offense charged." An accused many not be convicted of more than one offense it one offense is included in the other. Section 95-1711(2)(a), R.C.M.1947, now section 46-11-502(1) MCA. However, as the discussion above makes clear, to establish deliberate homicide and to establish aggravated kidnapping require proof of distinct and separate elements. In such a case the statutory provisions recited do not bar the conviction for aggravated kidnapping, *State v. Perry* (1979), Mont. 590 P.2d 1129, 1131, 36 St.Rep. 291, and defendant's double jeopardy claim fails on this point as well.

[5-12] The next issue with which we are confronted is whether *ex post facto* provisions in the federal and state constitutions or the statutorily codified rule of construction against retroactivity (section 12-201), R.C.M.1947, now section 1-2-109 MCA) prevent application of the sentencing statutes enacted in 1977 to this defendant. As was indicated in the recitation of facts, defendant committed the crime with which he was charged in 1974, however, upon resentencing after our remand, the District Court applied the statutes enacted in 1977. Defendant argues this violates the constitutional prohibition against *ex post facto* laws as well as the statutory provision against retroactivity. Defendant further argues he is entitled to be sentenced under the law in effect at the time the crime was committed. Because this Court has declared the provision mandating the death penalty which was effective at that time to be unconstitutional, defendant contends the maximum sentence he may receive is 100 years in prison.

In considering this issue, it must be initially determined what would cause the application of the 1977 statutes to an act committed in 1974 to run afoul of the *ex post facto* prohibition and the statutory rule of construction against retroactivity. Therefore what makes a statute *ex post facto* or "retroactive" becomes the keystone consideration. Simply because a statute operates on events antecedent to its effective date does not make

the statute *ex post facto, Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 nor does such operation make a law prohibitively retroactive. *Cox v. Hart* (1922), 260 U.S. 427, 435, 43 S.Ct. 154, 67 L.Ed. 332. Thus the *effect* the statute will have must determine its validity with respect to *ex post facto* or retroactive inhibitions.

The constitutional prohibition against *ex post facto* laws has its roots in the desire on the part of the framers of the United States Constitution to prevent the sovereign authority from making acts criminal which were innocent when committed as had been done by the British crown. *Calder,* 3 U.S. at 388-389. The Court in *Calder* noted the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice and "to prevent such, and similar acts of violence and injustice . . . the federal and state legislatures were prohibited from passing any . . . *ex post facto* law." *Calder.* The constitutional inhibition of *ex post facto* laws was thus intended "to secure substantial personal rights against arbitrary and oppressive legislative action." *Malloy v. South Carolina* (1915), 237 U.S. 180, 183, 35 S.Ct. 507, 59 L.Ed. 905; *Beazell v. Ohio* (1925), 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216.

Summarizing more than a century of definitions Justice Stone writing for a unanimous court in *Beazell* stated that:

> "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.* The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that *the criminal quality attributable to an act,* either by the legal definition of the offense or by the nature or

amount of punishment imposed for its commission, *should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.*" 269 U.S. at 169-170, 46 S.Ct. at 68-69. (Emphasis added.)

Clearly the important question in determining whether a subsequent statute and its application transgress this inhibition is whether some substantial right of the accused is materially affected. However, the Supreme Court has iterated the proposition that changes in procedure not affecting materially the rights of a defendant do *not* come within the constitutional prohibition.

For example, the State of Utah altered its rule governing the qualifications of witnesses, allowing felons to testify, after the accused committed the act but before his trial. The Court in *Hopt v. Territory of Utah* (1884), 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262, dismissed the *ex post facto* claim based on this charge even though the change had deterimental effect stating:

". . . [A]lterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedures only, *in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.*" 110 U.S. at 590, 4 S.Ct. at 210. (Emphasis added.)

Although the Court in *Thompson v. State of Utah* (1898), 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061, found the change from requiring a panel of 12 jurors to requiring a panel of 8, to have substantially affected the accused's rights and therefore be *ex post facto*, it stated no one had a vested right in mere modes of procedure. 170 U.S. at 352, 18 S.Ct. 620. Furthermore, "statutes regulating procedure, if they leave untouched all the substantial

protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws." 170 U.S. at 352, 18 S.Ct. at 623. In *Dobbert v. Florida* (1977), 432 U.S. 282, 92 S.Ct. 2290, 53 L.Ed.2d 344, the Supreme Court held that the trial and sentencing of the accused under statutes not in effect at the time of his crime did not violate *ex post facto* prohibitions. The Court ruled the changes were merely procedural, were less onerous than the law that had been previously declared unconstitutional, and did not change the quantum of punishment attached to the crime. 432 U.S. at 292, 294, 92 S.Ct. 2290.

The inhibition upon *ex post facto* laws then, does not give an accused a right to be tried, in all respects, by the law in force when the crime charged was committed providing he has not been deprived of any substantial right or immunity he possessed at the time of the commission of the offense charged. *Dobbert*, 432 U.S. at 293-294, 92 S.Ct. 2290; *Malloy*, 237 U.S. at 183, 35 S.Ct. 507; *Gibson v. Mississippi* (1896), 162 U.S. 565, 590, 16 S.Ct. 904, 40 L.Ed. 1075. However, the Court has made clear a change which is labeled procedural will not except it from *ex post facto* prohibitions if it invades or modifies rights of a party charged with a crime. *Kring v. Missouri* (1883), 107 U.S. 221, 232, 2 S.Ct. 443, 27 L.Ed. 506. (The change in *Kring* made evidence that was conclusive of innocence not a factor at all, and in effect increased the punishment for the offense.) Just what changes in "procedure" will be held to be of sufficient moment:

". . . to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . .and not to limit the legislative control of remedies and modes of procedure which do not effect matters of substance." (Citations omitted.) *Beazell*, 269 U.S. at 171, 46 S.Ct. at 69.

The Supreme Court has also stated a statute which, when viewed in the light of reason and common sense, mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Rooney v. North Dakota* (1905), 196 U.S. 319, 325, 25 S.Ct. 264, 49 L.Ed. 494; *Calder*, 3 U.S. at 390.

Section 12-201, R.C.M.1947, now section 1-2-109 MCA, states that no law is "retroactive" unless expressly so declared. However, this is but a rule of construction and what is "retroactive" so as to warrant application of the rule has been defined judicially by this and other courts. A statute is *not* "retroactive" merely because it draws upon antecedent facts for its operations. *Cox v. Hart*, 260 U.S. at 157, 43 S.Ct. 154. A statute is "retroactive" in a legal sense "which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions already past." *City of Harlem v. State Highway Commission* (1967), 149 Mont. 281, 425 P.2d 718, 720; *Dunham v. Southside National Bank* (1976), 169 Mont. 466, 548 P.2d 1383, 1386; *Butte & Superior Mining Co. v. McIntyre* (1924), 71 Mont. 254, 229 P. 730; *Sturges v. Carter* (1885), 114 U.S. 511, 5 S.Ct. 1014, 29 L.Ed. 240.

In 1973, the legislature enacted section 94-5-303, R.C.M.1947, now section 45-5-303 MCA, and section 94-5-304, R.C.M.1947. Ch. 513, Laws of Montana (1973). The former section set forth the elements of the crime of aggravated kidnapping and stated "a person convicted of aggravated kidnapping *shall be punished by death* as provided in section 94-5-304 *or [imprisonment]* . . ." (Emphasis added.) Section 94-5-304, as it then read, imposed the death penalty if the victim dies as a result of the criminal conduct "unless there are mitigating circumstances." The quoted language was deleted by the 1974 amendment to section 94-5-304, making the death penalty mandatory in those circumstances specified. Ch. 126, Laws of Montana (1974). Section 94-5-304 was repealed in 1977 by Ch. 338, Laws of Montana (1977) which enacted the current scheme for imposition of the death penalty; that is, providing for a separate sentencing hearing; consideration of mitigating or aggravating circumstances,

written findings and conclusions, and expedited review of the sentence. It is important to note that the original enactment of section 94-5-303(2), now section 45-5-303(2) MCA, effective when the crime involved here was committed, was never altered by the amendments and has *always* provided the crime of aggravated kidnapping shall be punished by death or imprisonment. The amendments have related *only* to the *procedure* the court must follow in imposing the sentence.

The 1974 amendment, effective when the crime was committed, *mandated* a death penalty if the victim dies as a result of the criminal conduct. The 1977 amendments ameliorated this, allowing an exercise of judicial discretion within certain limits and requiring consideration of mitigating circumstances. Clearly, the latter amendments lessened the rigor of the 1974 amendments and are less onerous than the 1974 law. As such they, on their face, cannot be considered *ex post facto. Calver v. Bull*, 3 U.S. at 390; *Rooney v. North Dakota*, 196 U.S. at 325, 25 S.Ct. 264; *Dobbert v. Florida*, 432 U.S. at 292-294, 92 S.Ct. 2290. Because the accused has no vested right in modes of procedure not materially affecting his rights, and because the changes in the law on their face do not impose new obligations or duties or disabilities in respect to transactions already past, the changes are also not on their face retroactive. *City of Harlem*, 425 P.2d at 720; *McIntyre*, 229 P. at 733. In fact, had there been no declaration of unconstitutionality in the first *Coleman* decision, the District Court may well have been *obligated* to apply the 1977 statutes as their changes benefited the accused. *Marks v. United States* (1977), 430 U.S. 188, 197, 97 S.Ct. 990, 51 L.Ed.2d 260.

Because this Court *did* declare the 1974 amendment mandating the death penalty unconstitutional, the *ex post facto* and "retroactive" arguments are raised by defendant. Thus, the crucial question becomes what is the effect of that declaration. It must be emphasized the decision in *Coleman*, declared unconstitutional *only* section 94-5-304 as amended in 1974. The preceding section 94-5-303, enumerating the elements of the crime and the potential punishment was not addressed by the decision and has remained viable since its enactment in 1973.

There exists a rule of statutory construction that a statute declared unconstitutional is considered void *ab initio* and has no effect. This proposition is best typified by the following statement of Justice Field in *Norton v. Shelby* (1886), 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The aim of such a rule of construction is to hold the exercise of legislative power in excess of constitutional limits to be of no effect. Field, *The Effect of an Unconstitutional Statute* (1935), pp. 8-12. The author of the cited treatise, however, indicated the absoluteness of such a doctrine was breaking down and applauded such development. Field, p. 12. Indeed, the United States Supreme Court, which first announced the doctrine, has indicated the rule is *not* absolute and has further indicated its recession from that rule.

In *Chicot County Drainage District v. Baxter State Bank* (1940), 308 U.S. 371, 374, 60 S.Ct. 317, 84 L.Ed. 329, where the validity of a judicial decree based upon a statute subsequently declared unconstitutional was questioned, the Court indicated the broad statement that appeared in *Norton* must be taken with qualifications and in a later decision, the Supreme Court stated:

> ". . . the effect of a given constitutional ruling on prior conduct 'is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality;" and "of public policy in the light of the nature both of the statute and its previous application." ' . . However appealing the logic of *Norton* may have been in the abstract, *its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and shaping their conduct.*" *Lemon v. Kurtzman* (1973), 411 U.S. 192, 198-199, 93 S.Ct. 1463, 36 L.Ed2d 151. (Emphasis added.) (quoting from *Linkletter v. Walker* (1965), 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 and *Chicot County Drainage Dist.*, supra.)

Both *Chicot County* and *Lemon* are civil cases but the case which announced the rule, *Norton v. Shelby* was also a civil action. This Court in *Ex Parte Anderson* (1951), 125 Mont. 331, 238 P.2d 910, 913, stated "an unconstitutional law is void, and is as no law. An offense created by it is not a crime." The Court then invalidated an entire criminal statute because it had been preempted by federal action in the same area. In the first *Coleman* appeal, the statute declared unconstitutional did not define the crime, rather related only to the procedure of imposing sentence. Our action in declaring the prior statute unconstitutional did not affect the substantial elements of crime. Moreover, the statement relied upon by the *Anderson* Court, found in *Ex Parte Siebold* (1879), 100 U.S. 371, 376, 25 L.Ed. 717, was dicta in *Siebold* as the Supreme Court did not find the statute there in question to be unconstitutional.

There are "hard facts" present in this appeal which this Court must consider in making its determination. A fundamental concept of our constitutional liberty is that the *ex post facto* clause is based upon the principle that persons have the right to fair warning of conduct which will give rise to criminal penalties. *Marks v. United States*, 430 U.S. at 191, 97 S.Ct. 990. The substantive portion of the aggravated kidnapping statute, enumerating the elements of the crime and declaring the quantum of punishment, has not been altered since its enactment in 1973. The changes made by the 1977 statutes from the 1974 law ameliorated a mandatory death penalty to one imposed only after certain procedural steps were taken. Those procedural steps *were* followed in the resentencing of Dewey Coleman. At the time the crime was committed the statutes were clear that the penalty of death was a very probable consequence for the commission of the crime.

The defendant has cited this Court to cases from this and other jurisdictions and urged us to follow their precedent and hold the statutes in question here may not be applied to defendant. However, those cases can be distinguished. In *State v. Rodgers*

(1978), 270 S.C. 285, 242 S.E.2d 215, the defendants were tried, convicted and sentenced under death penalty statutes enacted in 1974. Those statutes were later ruled unconstitutional. The State then petitioned to have the defendants resentenced under statutes promulgated in 1977 which were very likely constitutional. Those statutes provided for procedural safeguards at *all phases of the criminal adjudication process* from pretrial to sentencing. The South Carolina Supreme Court denied the State's petition because the defendants therein did not receive all the procedural safeguards mandated by the 1977 enactments. 242 S.E.2d at 218. In the present cause the safeguards enacted in 1977 related *only* to the sentencing phase of the criminal adjudication process and the defendant here *did receive* those protections. In *People v. Teron* (1979), 23 Cal.3d 103, 151 Cal.Rptr. 633, 588 P.2d 773, the California Supreme Court refused to apply sentencing provisions enacted in 1977 to a crime committed in 1975. The statutes in effect in 1975 had been declared unconstitutional. 151 Cal.Rptr. at 640, 588 P.2d at 780. Factually the *Teron* case is distinguishable from the one here, because the declaration of unconstitutionality occured in 1976 while defendant was not charged with the crime until April 1977 and the 1977 statutes did not become effective until August 1977. Therefore, when the defendant was charged with his crime there existed in fact no constitutional death penalty statutes in California. 151 Cal. Rptr. at 640, 588 P.2d at 780. Here Coleman committed the crime in 1974, was tried, convicted and sentenced in 1975, the legislature repealed the 1974 act in 1977, and this Court declared the 1974 law unconstitutional in 1978. Unlike *Teron*, Coleman was tried, and convicted under constitutional statutes, but sentenced under a statute later declared unconstitutional.

State v. Lindquist (1979), 99 Idaho 766, 589, P.2d 101, is the strongest authority for Coleman's "retroactive" argument. There the defendant committed his crime in 1975, was tried, convicted and sentenced in 1976. The laws were amended in 1977 and when the Idaho court considered the appeal, after declaring the laws in effect in 1975 and 1976 to be unconstitutional, it was faced with the question whether the 1977 laws could be applied on resentencing. The Court held they could not, on the basis they were retroactive. 589 P.2d at 103. However, the majority opinion devotes no

discussion to what constitutes a retroactive law, assuming apparently that because the application of the 1977 laws would relate to events antecedent to their effective date, they are retroactive. 589 P.2d at 103, 104. Clearly such a discussion is necessary for, as the above disclosure indicates, not all statutes relating to events antecedent to the effective date of the statutes are retroactive. The dissent of Justice Donaldson in *Lindquist* discusses this point. 589 P.2d at 112, 113. Thus the *Lindquist* opinion loses some of its authoritative impact for this lack.

Finally, in *State v. Gone* (1978), Mont., 587 P.2d 1291, 35 St.Rep. 1540, this Court held that, based upon the facts there present, the application of laws enacted after the crime was committed would violate *ex post facto* prohibitions. 587 P.2d at 1297. In *Gone*, a later statute permitted the sentencing court to impose a sentence without the possibility of parole, a discretion not granted under laws in effect when the crime was committed. Clearly this later enactment allowed the punishment for the offense to be aggravated beyond that available when the offense was committed and was obviously *ex post facto*. However, here the later enactments *do not aggravate* the *punishment* for the crime, but only change the procedure for imposing the sentence. The punishment for the crime according to section 94-5-303(2), R.C.M.1947, now section 45-5-303(2) MCA, has *always* been death or imprisonment.

The changes made by the 1977 enactments affected only the manner in which the penalty indicated by statute was to be determined and imposed. They did not deprive Coleman of any defense previously available nor affect the criminal quality of the act charged. Nor did they change the legal definition of the offense or the punishment to be meted out. They did not make an act criminal which was innocent when done; they did not increase the penalty for the crime. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remained the same. No substantial right or immunity possessed by Coleman at the time of the commission of the offense was taken away by the 1977 enactments. Indeed they eased the rigor of the law as it existed at the time the offense was committed.

> "'. . . so far as mere modes of procedure are concerned, a party has no more right, in a criminal than a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice in existence when its facts arose. The legislature may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully . . . dispense with any of those substantial protections with which the existing law surrounds the person accused of the crime.' " *Thompson v. State of Utah*, 170 U.S. at 351, 352, 18 S.Ct. at 623 (quoting with approval from Cooley on Constitutional Limitations); *People v. Ward* (1958), 50 Cal.2d 702, 328 P.2d 777, 780.

The statutes in question also did not impair vested rights, or create new duties, obligations, or disabilities with respect to transactions already past.

Only if we were to adhere rigidly to the rule of construction announced in *Norton v. Shelby,* supra, that a statute declared unconstitutional is treated as never having had an operational effect, could the 1977 statutes be read to interfere with the substantial rights of Dewey Coleman. Yet the absolute application of this rule has been abandoned by the Court which promulgated it, the United States Supreme Court. To follow the rule here, as this Court must in order to find an *ex post facto* violation or "retroactive" effect, would be impliedly stating Dewey Coleman at the time he committed his crime had the omniscience that four years hence the statute prescribing the procedure for imposing the penalty for the crime would be declared unconstitutional and that at the time the crime was committed no valid procedure existed. Clearly such a conclusion stretches reason to the breaking point.

We therefore hold that the District Court properly applied the 1977 statutes relating to the imposition of the death penalty to this defendant.

[13-16] Having decided no *ex post facto* violations nor transgressions of the rule against retroactive statutes have occurred, and the 1977 statutes are applicable here, we reach defendant's arguments that these statutes are unconstitutional. At the outset, we note the Supreme Court has held the punishment of death does not invariably violate the constitutional prohibition against cruel and unusual punishment. *Gregg v. Georgia* (1976), 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859. Furthermore, the *Gregg* court indicated that in the abstract, a penalty is not excessive if it does not involve the wanton and unnecessary infliction of pain and is not grossly out of proportion to the severity of the crime. 428 U.S. at 173, 96 S.Ct. 2909. Finally, the court stated it must presume the validity of a punishment selected by a democratically elected legislature. 428 U.S. at 175, 96 S.Ct. 2909.

As we stated in *State v. McKenzie* (1978), Mont., 581 P.2d 1205, 1228, 35 St.Rep. 759, the United States Supreme Court in its decisions of *Gregg; Proffitt v. Florida* (1976), 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; and *Jurek v. Texas* (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, seems to have established three general criteria which are requisite to a valid scheme for imposing the death penalty. First, there must be at least one statutory aggravating circumstance before a death sentence may be considered. Second, the defendant must be afforded the opportunity to bring before the sentencing body at a separate sentencing hearing any mitigating circumstances relating to the individual defendant. Third, there must be available prompt judicial review of the sentencing decision by a court of statewide jurisdiction, providing a means to promote the even-handed, rational and consistent imposition of death sentences under the law. A refinement of the second criterion was added by the decision in *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, that the sentencing body must not be precluded from considering any aspect of the defendant's record or character as a mitigating factor. 438 U.S. at 589, 98 S.Ct. at

2957, 57 L.Ed.2d at 980. The death penalty must also not be imposed mandatorily without only consideration of mitigating factors. *Coleman*, 579 P.2d at 741-742.

Sections 95-2206.6 and 95-2206.7, R.C.M. 1947, now sections 46-18-301 and -302 MCA provide for a separate sentencing hearing in death penalty cases at which the sentencing court may consider any evidence relevant to the sentence and at which the defense may argue against the penalty. Sections 95-2206.8 through 2206.10, R.C.M.1947, now sections 46-18-303 through -305 MCA enumerate aggravating and mitigating factors to be considered and direct the sentencing court to consider one against the other. Section 95-2206.11, R.C.M.1947, now section 46-18-306 MCA provides for written findings supporting the determination of the court in cases where a death penalty is imposed. Sections 95-2206.12 through -2206.15, R.C.M.1947, now sections 46-18-307 through -310 MCA provide for an expedited review of the death penalty sentence and set forth standards by which this Court must review the sentence.

Defendant argues sections 95-2206.8-2206.9, -2206.10, R.C.M.1947, now sections 46-18-303, -304, -305 MCA do not allow for the proper consideration of mitigating circumstances and in effect impose a mandatory death penalty should one of the statutory aggravating circumstances be found. Defendant's conception of the operation of these provisions is much too restricted and we do not agree that they in effect mandate a death penalty whenever an aggravating circumstance is found.

Section 95-2206.10, R.C.M.1947, now section 46-18-305 MCA, instructs the sentencing court to take into account the aggravating and mitigating circumstances enumerated in sections 95-2206.8 and -2206.9 and to impose a sentence of death "if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." (Emphasis added.)

The United States Supreme Court has held the Eighth and Fourteenth Amendments require consideration of the character and record of the individual offender and the circumstances of the particular offense in a determination whether to impose the death penalty. *Woodson v. North Caroline* (1976), 428 U.S. at 303-305,

96 S.Ct. 2978. In *Jurek*, the Court had before it a statutory scheme that explicitly mentioned *only* aggravating circumstances, yet the Court found the scheme constitutional in light of the Texas Appeals Court's construction of the scheme requring consideration of mitigating factors. 428 U.S. at 272-273, 96 S.Ct. 2978. Clearly Montana's statutes go farther than those approved in *Jurek* by explicitly requiring consideration of mitigating circumstances, thus making subjective the sentencing determination as required by *Woodson*. We do not read sections 95-2206.8 through 95-2206.10, R.C.M.1947, now sections 46-18-303 through 46-18-305 MCA as mandating the death penalty upon the finding of an aggravating circumstance, but rather as requiring consideration of whatever mitigating circumstances exist to determine if they outweigh the aggravating circumstances found to be present.

Defendant argues that Montana's death penalty statutes would be subject to reversal by the U.S. Supreme Court because of that court's decision in *Lockett v. Ohio*, supra, and its vacation and remand in light of *Lockett* in *Jordan v. Arizona* (1978), 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157. An examination of these cases leads us to the opposite conclusion. Basically *Lockett* held a sentencing entity should not be precluded from considering any aspect of a defendant's character or record as a mitigating factor. The Ohio statutes enumerated three mitigating factors and required their consideration in language identical to Montana's statute. See *Jordan v. Arizona* (1976), 114 Ariz. 452, 561 P.2d 1224. However, the Arizona enumeration, like the Ohio enumeration is on its face exclusive, thus warranting the vacation of the death penalty and remand in light of *Lockett*. Montana's statute does not suffer from this defect. Although it enumerates mitigating factors, section 95-2206.9(1) through (7), R.C.M.1947, now section 46-18-304(1) through (7) MCA, it also clearly indicates the sentencing body should consider *any other fact* existing in mitigation of the penalty. Section 95-2206.9(8), R.C.M.1947, now section 46-18-304(8) MCA. This inclusive factor was not present in either the Ohio or Arizona scheme.

Defendant also contends because he received the death penalty for aggravated kidnapping but only a life sentence for deliberate

homicide, the death penalty imposed constitutes the cruel and unusual punishment prohibited by the Eighth Amendment. We do not agree. As was made clear in *Williams* there is no constitutional requirement for the same or proportionate sentences when the crimes are separate and independent. 358 U.S. at 586, 79 S.Ct. 421. We have indicated above the crimes of deliberate homicide and aggravated kidnapping are separate and independent crimes and defendant's conviction of each violated no double jeopardy protections. Furthermore, the Supreme Court in *Gregg*, made clear "when a life has been taken by an offender [it cannot be said] the punishment [of death] is invariably disproportionate to the crime." 428 U.S. at 187, 96 S.Ct. at 2932. The decision of the Court in *Coker v. Georgia* (1977), 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982, is relevant only to crimes for which the penalty has been imposed which did *not* result in the loss of a life. Such is not the case here.

We have considered defendant's contentions with respect to jury participation in the sentencing procedure and with respect to statutory requirements of a finding of guilty beyond a reasonable doubt in a case where death is a possible penalty and determine these contentions do not alter our conclusion as to the constitutionality of sections 95-2206.6 through 95-2206.15, R.C.M.1947, now sections 46-18-301 through -310 MCA.

This Court therefore concludes that Montana's statutory scheme for imposing the death penalty meets the standards established by the *Gregg, Jurek, Proffitt* and *Woodson* decisions. We further conclude the penalty is not cruel and unusual simply because Montana's criminal statutes allow its imposition in this case for the crime of aggravated kidnapping but not for the crime, as committed here, of deliberate homicide.

[17] We turn now to defendant's contention that his counsel was not permitted to present arguments against imposition of the death penalty, contrary to the mandate of section 95-2206.7 now section 46-18-302 MCA, which states in pertinent part: "The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." Defendant maintains because it appears from the record that the District Court had already determined the sentence prior to the July 10,

1978 date set for pronouncing sentence, defendant was denied the opportunity to present any arguments against the death penalty. This contention is without merit. The District Court issued an order dated June 2, 1978, clearly indicating a sentencing hearing was to be held on June 14, 1978, in accordance with sections 95-2206.6 through 95-2206.11, R.C.M.1947, now sections 46-18-301 through -306 MCA. Those sections indicate what a sentencing court must consider in imposing the death penalty, including specifically that defendant or his counsel be allowed to present argument against the death penalty.

Therefore by the June 2, 1978 order, the defendant and his counsel were on notice of the proposed content of that hearing. However, at the sentencing hearing, defendant did not present any evidence of mitigating circumstances other than the presentence report. No statement against the death penalty was made other than to suggest certain procedures to test its constitutional validity before it was in fact imposed. Defendant had his opportunity to speak and did not avail himself of it. Finally, the District Court order of July 31, 1978, denying defendant's petition for rehearing indicates the defendant also did not take advantage of the District Court's offer to accept proposed findings and conclusions from the parties with respect to the sentence. Thus defendant and his counsel had at least two opportunities to submit argument to the Court regarding the death penalty prior to the July 10, 1978 hearing, but did not do so.

[18-28] We have determined thus far that defendant's conviction for aggravated kidnapping violated no constitutional prohibitions against double jeopardy, that the 1977 provisions for imposition of the death penalty are applicable to this defendant and furthermore are constitutional, and that this defendant was given an opportunity to present arguments against the death penalty. We come now to that part of this appeal which constitutes a review of the sentence received by defendant. In conducting this review, we will consider defendant's arguments regarding the proportionality of the penalty received in relation to other factors.

The decision in *Gregg* compels this Court to determine "whether the punishment of death is disproportionate in relation

to the crime for which it is imposed." *Gregg*, 428 U.S. at 187, 96 S.Ct. at 2931. In undertaking such a consideration, we are directed by section 95-2206.15, R.C.M.1947, now section 46-18-310 MCA to consider whether the sentence was imposed as a result of passion, prejudice or other arbitrary factors; whether evidence supports the sentencing court's findings regarding aggravating and mitigating circumstances; and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. We make such an assessment based upon our independent review of the trial record and transcript, and of the record and transcript of the sentencing hearing. In so doing, we are not usurping the position of the District Court as the primary sentencing entity in Montana's system of criminal jurisprudence (see section 95-2212, R.C.M.1947, now section 46-18-103 MCA); rather we mean to insure that a penalty as unique in its severity and as irrevocable as the death penalty is not wantonly and freakishly, or arbitrarily and capriciously imposed. See, *Furman v. Georgia* (1972), 408 U.S. 238, 309-310, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Stewart, J., concurring)' *Gregg*, 428 U.S. at 188-189, 96 S.Ct. 2909.

Defendant has argued the sentence imposed here was a result of passion, prejudice or other arbitrary factors. We have considered defendant's arguments in this regard and determined that two warrant discussion. Defendant argues the sentences given to Robert Dennis Nank, defendant's accomplice in this crime, when compared to his own reflect the prejudice inherent in the sentencing. Nank, a white man, pled guilty to the offenses of deliberate homicide and solicitation to commit sexual intercourse without consent and received 100 year and 40 year sentences respectively. Defendant argues because he is black, his sentence of death for crimes arising from the same incident as those of Nank's reflects obvious prejudice. We do not agree. Nank and this defendant received similar sentences for similar crimes namely, 100 years for deliberate homicide and 40 and 20 years respectively for the charges stemming from the act of sexual intercourse without consent. However, defendant was also found guilty of aggravated kidnapping, a charge finally dropped against Nank. It is for this crime the death penalty was imposed.

Defendant is correct in his assertion the prosecution refused to accept his guilty plea to the same charges to which Nank had pled guilty. Defendant offered to plead guilty to the same charges to which Nank had pled guilty, however he insisted such plea must indicate he was innocent. The prosecution refused to accept this offer and we have previously held the refusal of a conditional offer not to be erroneous. *State v. Coleman*, 579 P.2d at 744-745. We do not find prejudice in defendant's sentencing simply because of the sentences his accomplice received.

Defendant has also argued his race was a factor operating to his prejudice with respect to the imposition of the death penalty. However, defendant points to no evidence of this prejudice other than the fact of the sentence and the fact of his race. Defendant has speculated as to various possible factors evidencing such prejudice, but speculation is not sufficient to establish this claim. We have examined the sentence and determine it was not imposed as a result of passion, prejudice or other arbitrary factors, or because of his race.

Defendant contends there was evidence of mitigating factors present and the District Court did not give proper consideration to evidence when making its findings, conclusions, and when rendering judgment. The District Court is required by section 95-2206.10, R.C.M.1947, now section 46-18-305 MCA to consider and compare aggravating and mitigating circumstances and can impose the death penalty only if there exists at least one aggravating circumstance and no mitigating circumstances of sufficient substantiality to call for leniency. Section 95-2206.10, R.C.M.1947, now section 46-18-305 MCA. This Court is required upon review of the sentence to determine whether there is evidence to support the District Court's findings and conclusions regarding aggravating and mitigating circumstances. Defendant admits the District Court properly found and concluded that the aggravating factor found in section 95-2206.8(7), R.C.M.1947, now section 46-18-303(7), MCA (death of the victim of aggravated kidnapping) was present. What we now determine is whether the District Court was correct in its conclusion that there was no evidence of mitigating factors sufficiently substantial to call for leniency.

Defendant presented no evidence of mitigating circumstances at the sentencing hearing, though his counsel acknowledged the existence of the presentence investigation report. That report indicated the defendant had no record of criminal activity and had been an accepted member of the community where he lived prior to July 4, 1974, the date of the commission of this crime. The evidence in this case supporting the finding of the aggravating circumstance established that the defendant had been a deliberate, voluntary participant in the kidnapping and subsequent rape and murder of the victim. The evidence further established that the death of the victim occurred after a sexual assault, not in a moment of passion, but over a period of time with the defendant first bludgeoning, then attempting to strangle, then finally drowning the victim in an effort to effectuate a deliberate decision to kill Peggy Harstad. Against the record of this brutal crime, we cannot say that the defendant's lack of prior criminal activity of record is a factor sufficiently substantial to call for leniency. Moreover, the District Court did consider the mitigating circumstance of defendant's lack of a criminal record but concluded this circumstance was offset by evidence that defendant had committed a burglary on the same day the kidnap, rape and homicide occurred. Defendant has argued accomplice Nank's testimony, the source of this evidence, was uncorroborated as to this fact. However, Nank was sufficiently corroborated on other aspects of his testimony and we have so held. *Coleman*, 579 P.2d at 748. Where an accomplice has been corroborated as to part of his testimony and that testimony has been accepted as truthful, it is proper for the court to infer the accomplice spoke the truth as to all his testimony. *State v. Phillips* (1953), 127 Mont. 381, 264 P.2d 1009, 1016; *Territory v. Corbett* (1877), 3 Mont. 50; *Roberts v. State* (Okl.Crim. 1977), 571 P.2d 129, cert. den. 434 U.S. 957, 98 S.Ct. 485, 54 L.Ed.2d 316; *People v. Blau* (1956), 140 Cal. App.2d 193, 294 P.2d 1047; *State v. Gross* (1948), 31 Wash.2d 202, 196 P.2d 297; 23 C.J.S. *Criminal Law*, § 812(2). See also, *State v. Jones* (1933), 95 Mont. 317, 26 P.2d 341. We therefore determine the District Court was correct in its conclusion.

We now must compare this sentence to those imposed in similar cases to determine whether it was excessive or disproportionate to those other sentences. Section 95-2206.15, R.C.M.1947, now section 46-18-310 MCA. As this is the first time this Court has reviewed a sentence for death under the new statutory scheme, we are obligated to define the scope of our review when considering similar cases.

It is clear from the decision in *Gregg* that the purpose of appellate review in a capital sentencing system is to serve as "A check against the random or arbitrary *imposition* of the death penalty." 428 U.S. at 206, 96 S.Ct. at 2940. (Emphasis added.) This review eliminates the possibility a death sentence will be imposed by the action of an "aberrant" sentencing entity. *Gregg*, supra. The Georgia Supreme Court, construing language identical to that in our own statutes, has stated in considering similar cases:

> ". . . this court is not required to determine that less than a death sentence was never *imposed* in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been *imposed* generally and not 'wantonly and freakishly' *imposed* as stated by Justice Stewart in his concurring opinion in *[Furman*, supra]." *Moore v. State* (1975), 233 Ga. 861, 213 S.E.2d 829, 832 (cited with approval in *Gregg*, 428 U.S. at 205, 96 S.Ct. 2909). (Emphasis added.)

The emphasis in both *Gregg* and *Moore* is on the *imposition* of the penalty, not upon the subsequent outcome of any appeal from that imposition. See also, *Jarrell v. State* (1975), 234 Ga. 410, 216 S.E.2d 258; *Gregg v. State* (1974), 233 Ga. 117, 210 S.E.2d 659. Indeed, Georgia has indicated it will consider cases where the penalty has been imposed by the jury but vacated on appeal for reasons not material to the sentence. *Stanley v. State* (1977), 240 Ga. 341, 241 S.E.2d 173, 180. Therefore, we conclude in fulfilling our duty to compare "similar cases" we may include for com-

parison similar cases where the sentence has been *imposed* by the District Court, even though the sentence has been vacated on appeal. Of course, such vacation must not have been predicated upon the sentencing court's acting in a manner contrary to the standards set forth in section 95-2206.15, R.C.M.1947, now section 46-18-310 MCA, nor have resulted in a complete dismissal of the cause. Furthermore, based upon *Gregg*, 428 U.S. at 204- 206, 96 S.Ct. 2909, and Proffitt, 428 U.S. at 258-259, 96 S.Ct. 2960, we determine we need not examine *every* similar case whether appealed or not, rather we need only examine those cases where after conviction the death penalty could have been or was imposed that have reached our attention through the appellate process. Because it is extremely rare that a defendant would acquiesce in a death sentence, we believe this procedure will insure we have a more than adequate representation of "similar cases." We will thus consider cases where the defendant has been charged with kidnapping and murder of the victim of the kidnapping and where the defendant has been charged with aggravated kidnapping where the victim has been killed.

A complicating factor in our review of similar cases is that the last hanging of a criminal defendant in Montana occurred in 1943. In the following quarter of a century, although several heinous murders occurred, the death penalty was assessed only a few times by District Courts. During that period the sentencing entity had unfettered and unguided discretion with respect to imposition of the death penalty. Judicial and legislative attitudes have changes, however, and in the last six to eight years, death penalty revisions have been enacted and such penalties imposed, spurred perhaps by the growing incidence of such serious crimes. Moreover, the crime of aggravated kidnapping has been a part of our statutory law only since 1973. Any review of cases earlier than this decade is virtually meaningless because the death penalty was not involved unless one goes far back into our state history. There are cases, however, though not large in number, to which we can look for a meaningful comparison.

The defendants in *State v. Rhodes* (1974), 164 Mont. 455, 524 P.2d 1095, were charged with and convicted of first-degree murder, kidnapping and robbery. The defendants had escaped

from jail in Idaho, kidnapped Donald Kalberg in Montana, who was later found shot to death near Forsyth, Montana, and were later apprehended in Tennessee after kidnapping one other person. The evidence was clear that the defendants had committed the kidnapping and the "vicious, wanton, cold-blooded murder of Donald Kalberg." 524 P.2d at 1097. The District Court sentenced the defendants to death for the murder charge, and to the maximum penalty allowable for kidnapping, 10 years imprisonment. The sentence of the court for the murder charge was vacated by this Court as a result of the decision in *Furman*. It was *not* vacated for actions by the District Court contrary to the standards contained in section 95-2206.15, R.C.M.1947, now section 46-18-310 MCA, nor were the charges dismissed by this Court. 524 P.2d at 1098.

The defendant in *State v. McKenzie* (1978), Mont., 581 P.2d 1205, 35 St.Rep. 759, was charged with deliberate homicide and aggravated kidnapping as a result of the bludgeoning death of Lana Harding. The District Court imposed the death penalty for both offenses and this Court affirmed following remand from the United States Supreme Court. 581 P.2d at 1235. The victim was found draped over a grain drill, partially nude, with a rope tied around her neck, and severely beaten about the head and body. 581 P.2d at 1210. Death had been caused by the severe blows.

These are the convictions that we can construe as "similar cases". We note that it is only since 1973 that the death penalty could be imposed for aggravated kidnapping where the victim had been killed. In the case of *McKenzie*, where that circumstance has occurred, the penalty has been invoked. We also note Montana is a sparsely populated state and crimes of such violent nature do not occur as frequently here as they do in more densely populated states. We conclude the penalty of death imposed against this defendant for the aggravated kidnapping of Peggy Harstad which resulted in her death, was not excessive or disproportionate to the penalty imposed in similar cases in this state.

Defendant has argued that his sentence *is* disproportionate and excessive when compared to the sentences received by his accomplice, Robert Dennis Nank. We have already distinguished

the situations of these two persons above. Nank was sentenced only for deliberate homicide and solicitation to commit sexual intercourse without consent, the charge of aggravating kidnapping having been dismissed in return for his guilty plea and testimony at defendant's trial. Therefore, defendant's sentence of death for aggravated kidnapping is not excessive or disproportionate when compared to the sentences received by Robert Dennis Nank. Leniency in one case does not invalidate the death penalty in others. *Gregg*, 428 U.S. at 199, 224-226, 96 S.Ct. 2909.

[29] We come to the final issue in this appeal: whether upon review of the sentence imposed, this Court must reconsider issues regarding the merits of the cause raised and disposed of in the first *Coleman* appeal. We conclude we do not. Our examination of the record to review the imposition of the death penalty under the provisions of sections 95-2206.12 to 95-2206.15, R.C.M.1947, now sections 46-18-307 to -310 MCA, is not to reconsider determinations of merits already made, but to determine whether in light of such determinations the sentence has been equitably imposed. Our prior determination of an issue constitutes a final adjudication of that issue. *Belgrade State Bank v. Swainson* (1978), Mont., 578 P.2d 1166, 35 St.Rep. 113 (per curiam).

Defendant has argued the first *Coleman* decision as to certain issues was conditioned upon finding the death penalty invalid, thus a finding now that the penalty was validly imposed necessitates a reconsideration of those issues. An examination of the first *Coleman* opinion reveals the holdings of this Court which defendant alleges were dependent upon finding the death penalty constitutionally invalid, were made clearly without such dependency. *Coleman*, 579 P.2d at 745, 749, 752.

Judgement of the District Court is affirmed, except that the cause is remanded to the District Court for the purpose of resetting the execution date of the defendant, Dewey Eugene Coleman; said execution to be supervised by the sheriff of the county where he was tried. Section 46-19-103(3) MCA. If defendant or defendant's counsel should wish, he may submit a list of any other similar Montana cases that he may request us to review for comparative purposes, within the time provided for and as a part of any petition for rehearing in this cause.

HASWELL, C. J., and HARRISON and DALY, JJ., concur.

SHEA, J., dissenting.

SHEA, Justice, dissenting:

I would refuse to allow the death penalty to be imposed. In its first decision, this Court clearly indicated that the death penalty was not to be considered at the resentencing. This Court, moreover, has reached unfairly into application of retroactive statutes to permit the death penalty to again be imposed. Finally, assuming arguendo that the sentencing court could properly apply the 1977 death penalty statutes to the 1974 crimes, it did not properly apply the law, nor did this Court properly perform its mandatory review duties under the 1977 statutes.

After defendant had entered his pleas of not guilty to count I (deliberate homicide), count II (aggravated kidnapping), and count III (sexual intercourse without consent), the court, of its own motion amended the aggravated kidnapping charge by adding the following language: "*the alleged actions of the defendant resulted in the death of Peggy Lee Harstad.*" Defendant objected to such amendment, but to no avail.

The case was then tried and submitted to the jury on all three counts, and the jury was given general verdict forms on each count. But the trial court, because of its own amendment of count II, also submitted a special verdict or special interrogatory to the jury asking it if the aggravated kidnapping "resulted in the death of Peggy Lee Harstad." The jury, in addition to returning guilty verdicts on all three counts, answered the special interrogatory in the affirmative that the aggravated kidnapping "resulted in the death of Peggy Lee Harstad." Defendant also had objected to the submission of the special interrogatory to the jury.

In the first *Coleman* appeal, this Court ruled against the defendant on both issues. As to the trial court's amendment of count II, after defendant's plea, and over defendant's objection, this Court held that the amendment was one of form rather than substance because defendant was at all times aware that the State was seeking the death penalty. (*Coleman*, 579 P.2d at 732). However, this Court then stated the crux of its holding in relation to the amended information:

> "In any event, no legal prejudice resulted from the amendment of Count II in the light of our holding that Montana's death penalty statute as it existed in 1975 is unconstitutional." 579 P.2d at 746.

This language clearly indicates that this Court did not believe that upon the case being remanded to the District Court for resentencing that the death penalty would be reimposed by applying the 1977 statutes to the 1974 crimes.

Moreover, the language of this Court's opinion in the first Coleman appeal concerning the submission of the special interrogatory to the jury leads to the same conclusion. This Court ruled that the submission of the special interrogatory to the jury did not undermine the general verdicts also submitted to the jury. 579 P.2d at 751. But again, the crux of this Court's holding on this issue, is stated as follows:

> "In any event, our holding on Montana's death penalty statutes renders this specification of error nonprejudicial." 579 P.2d at 751.

These holdings on the questions of the amended information and submission of the special interrogatory to the jury, are a clear indication that this Court did not believe that defendant would be subject to the death penalty under his resentencing. These holdings, moreover, are a clear directive to the District Court that capital punishment was to be eliminated from its consideration. But, of course, it was the desire of the District Court to inflict the death penalty if there was any way possible, and therefore it chose to interpret this decision otherwise.

In its findings, conclusions, judgment, and order of death, dated July 14, 1978, the District Court summarized what it considered to be the essence of this Court's holding in overturning the first death sentence. (I note parenthetically, that its summary was a foregone conclusion, for on June 2, 1978, the same day as the remittitur of this Court arrived at the District Court, it set out an order to counsel for both sides that sentencing could be carried out pursuant to the 1977 death penalty statutes.) In any event its legal position is revealing:

> ". . . The Court limited its decision on overturning the death penalty to the absence of procedural requirements allowing the trial court to consider any mitigating circumstances in its imposition of a penalty under the unconstitutional death penalty statute. . .
> ". . . The statute as amended was declared unconstitutional in this case, *but the Supreme Court in remanding for resentencing did not specifically declare if the trial court could or could not impose the death penalty.* Coleman argues that since the mandatory statute was declared unconstitutional, Coleman cannot be sentenced to death under laws enacted after his conviction. (Emphasis added.)

"The Supreme Court at page 11 of its opinion indicates that if the death penalty had been imposed under proper procedural safeguards, the sentence would have been upheld. The Court states:

> " 'To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. (Citations.) None of these required procedures are present in Montana's death penalty statute as it existed in 1975, nor were they provided *otherwise in this case.* (Emphasis added.) Thus defendant's death sentence cannot stand.' (Emphasis is the trial court's.)
> "*The emphasized language strongly suggests that if the sentencing court had observed procedural requirements declared by recent U.S. Supreme Court decisions, the death penalty would have been upheld notwithstanding that Montana's mandatory law was unconstitutional.* (Emphasis added.)
> "The later enactment of section 95-2206.6, et. seq., spelling out the procedure, should not operate to take away the court's power to impose the death penalty under proper procedural safeguards. The death penalty is an operative fact under the Mon-

> tana Constitution and section 95-5-503, R.C.M.1947, and are not to be ignored because a procedurally effective statute is abrogated and other statutes are substituted therefor. As argued by the State from the *Dobbert* case, the circumstance that the defendant is afforded greater procedural protection by the trial court's utilization of sections 95-2206.6, et seq., does not fall within the prohibition of ex post facto laws.
>
> "In summary, the trial court in now pronouncing sentence is in a position to utilize the interim developments in sentencing procedure as reflected in recent U.S. Supreme Court decisions and the Montana statutes enacted in response thereto."

The court then listed its findings and conclusions and entered its order sentencing defendant to death for the second time.

The sentencing court obviously milked the majority decision as much as it could in order to arrive at a decision that would allow a reconsideration of the death penalty. True, this Court did not explicitly direct the District Court to eliminate the death penalty from its consideration. But a fair reading of our decision on the questions of the amended information and the special jury interrogatory leads to that conclusion.

The sentencing court concludes its original death penalty would have been approved if only it had the foresight to allow the defendant to present mitigating circumstances at a presentence hearing. Not only is this a misreading of the opinion by the District Court, but it is clear that such procedure would not have been approved. For the statutes themselves must provide for the presentencing hearing permitting evidence of aggravation and mitigation. As I covered the statutory requirements in my dissent in *State v. McKenzie* (1978), Mont., 581 P.2d 1205, 1266-1277, 35 St.Rep. 759, it would serve no useful purpose to again set forth these requirements as mandated by the United States Supreme Court. It is sufficient to say that the District Court is sadly mistaken.

It is equally clear that the trial court was interested only in applying *Dobbert* to the facts of this case and that it did not consider either the *ex post facto* provision in the Montana Constitution, or the statutory directive of section 12-201, R.C.M.1947, which prohibits any retroactive application of a statute unless it is specifically provided for in the statute. I must admit, however, that I am even more amazed by the majority's application of these laws to the facts of this case. It is a clear demonstration of what can happen when the law is not allowed to get in the way of the result.

It is unfortunate indeed that the majority has chosen to join lock step with the United States Supreme Court, and not only in interpreting the United States Constitution. The only reference the majority makes to the *ex post facto* provision of our own Constitution is where it sets forth the issue raised by the defendant:

> "The next issue with which we are confronted is whether *ex post facto* provisions in the federal and state constitutions or the statutorily codified rule of construction against retroactivity (section 12-201, R.C.M.1947, now section 1-2-109 MCA) prevent application of the sentencing statutes enacted in 1977 to this defendant . . ." (*State v. Coleman*, Mont., 605 P.2d 1010, 1979).

The statement of the issue in this way constitutes a forewarning that all issues are going to be decided by one standard—the standard set forth by the United States Supreme Court in *Dobbert v. Florida* (1977), 422 U.S. 282, 92 S.Ct. 2290, 53 L.Ed.2d 344. Why this Court consistently refuses to give more substantive meaning and protection to our own constitution provisions as opposed to that given by the United States Constitution, I cannot understand. The United States Supreme Court is not the sole repository of all wisdom. Nor can it be the final authority on the interpretation of the Montana Constitution.

Though we must accord all people every right to which they are entitled under the United States Constitution, there is nothing which prevents us from according them even more fundamental protection under our own Constitution. Article II, Section 31, 1972 Montana Constitution provides:

> "*No ex post facto law* nor any law impairing the obligations of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, *shall be passed by the legislature.*" (Emphasis added.)

Under this provision, I would hold that no law passed by the legislature after the commission of the crime, whether denominated substantive or merely procedural or ameliorative can be applied to permit a sentence of death, if the statutes applicable at the time of the commission of the crimes, were constitutionally deficient, and hence would not permit the imposition of the death penalty. The frailties of mankind (and judges must be included in this reference) are such that a man's life should not be subject to the hair-splitting mischief inherent in interpreting a retroactive application of the law.

In the *first Coleman* decision, we declared the provision calling for mandatory execution in the event of a conviction of the crime of aggravated kidnapping leading to the victim's death, to be unconstitutional. 579 P.2d at 741-742. Under the statutes then existing, defendant could not constitutionally be sentenced to death. For this reason, I would declare that the 1977 death penalty statutes (however they be denominated—substantive, procedural, ameliorative, or whatever) could not constitutionally be applied to defendant. Accordingly, the trial court had no authority to again sentence defendant to death.

Nor do I believe that there is any excuse of the majority's failure to give the defendant the benefit of a doubt in interpreting section 12-201, R.C.M.1947, (now section 1-2-109 MCA). That section falls within the chapter containing the rules of construction which are to apply to *all* statutes in the State of Montana. Section 12-201 provides:

> "*No law* contained in *any* of the codes or other statutes in Montana is retroactive *unless expressly so declared.*" (Emphasis added.)

The only reasonable interpretation of this statute is that the 1977 death penalty statutes can apply to the defendant only if the legislature expressly declared that these statutes were to have

retroactive effect. Not only is there a total lack of express declaration that the 1977 death penalty statutes are to be retroactively applied, but there is no room even to imply that the legislature intended them to have a retroactive effect. (See sections 95-2206.6 through 95-2206.15, R.C.M.1947, now sections 46-18-301 through 46-18-310 MCA). The statutes contain no directive for retroactive application.

This statute prohibiting retroactive application of legislative acts does not distinguish between retroactive application of a procedural statute or retroactive application of the statute that is considered substantive. It prohibits retroactive application of *any* statute—period—unless it is "expressly declared" to have retroactive application. The hair-splitting business of distinguishing between a substantive law and a procedural law must stop when a man's life literally hangs in the balance.

This Court has also ignored fundamental case law previously adopted by this Court in interpreting section 12-201. Because it is a rule of construction which applies to all statutes enacted by the legislature, it will not be given retroactive effect unless expressly so declared. *State ex rel. Whitlock v. State Board of Equalization* (1935), 100 Mont. 72, 84, 45 P.2d 684. This holding does nothing more than to give full meaning to the express language of section 12-201. This Court also held that statutes are intended to operate prospectively only, in the absence of a contrary intention clearly expressed in the statutes, and that every reasonable doubt is resolved against a retroactive application of a statute. *State ex rel. Mills v. Dixon* (1923), 68 Mont. 526, 528, 219 P. 637.

The death penalty statutes enacted in 1977 were not expressly declared by the legislature to be retroactive in application. The statutes are silent. It is presumed therefore, that they were intended to operate only prospectively. Other than an emasculation of the law there is no way that this Court should have declared them, in essence by judicial fiat, to operate retroactively. Section 12-201 prohibits such interpretation; *Whitlock,* supra, solidifies this statute; and *Dixon,* supra, clearly establishes that every reasonable doubt should be resolved against retroactive application of a statute. If there are not legitimate policy reasons in a

death penalty case to resolve a resonable doubt against retroactive application in order to save a man's life, I cannot conceive of another instance where such policy reasons would exist. By suspending the operation and effect of section 12-201, this Court has inflicted a grave injustice upon the defendant—one that can never be rectified.

There is, moreover, another statute which this Court, as well as the trial court, totally ignored in reaching its decision. Section 43-507, R.C.M.1947 (now section 1-2-201(1) MCA) provides:

> "Every statute, unless a different time is prescribed therein, takes effect on the first day of July of the year of its passage and approval."

The death penalty statutes (sections 95-2206.6 through 95-2206.15) provide no time as an effective date. Accordingly, they were effective as of July 1, 1977. Though the majority ignored this statute, it does appear that somehow they would have avoided its application to the defendant's case. But, at least they owed the defendant an explanation.

Conceding arguendo that it was proper to apply the 1977 death penalty statutes to the 1974 crime, it is still abundantly clear that the trial court failed to follow the statutes, and that this Court failed to fulfill its statutory functions under the mandatory review provisions of the statutes. For these reasons also, the death penalty should not be allowed to stand.

To place this second sentencing in proper perspective with the first sentencing, I digress to the circumstances surrounding the first trial insofar as they are pertinent to the imposition of the first death sentence.

The aggravated kidnapping statutes called for the *mandatory* infliction of the death penalty if the victim died as a result of the kidnapping. (Sections 94-5-303, and 94-5-304, R.C.M.1947.) Originally the State did not allege in Count II of the information (the aggravated kidnapping charge) that the victim died as a result of the kidnapping. But after the defendant had entered his plea, and over defendant's objection, the trial court, on its own motion, amended Count II to allege also that the victim died as a result of the kidnapping. As so often is the case, this Court does

not know why the trial court did this, but it appears that it believed that the lack of this allegation would be fatal to the imposition of a death penalty if defendant was convicted of aggravated kidnapping. The trial court followed up this allegation by submitting a special interrogatory to the jury, asking it to determine whether or not the victim died as a result of the kidnapping. In addition to returning a general verdict of guilty to the charge of aggravated kidnapping, the jury answered the special interrogatory in the affirmative—that is, that the victim did die as a result of the kidnapping. The state was then set for the imposition of the mandatory death penalty.

Based on the amended information and the jury's answer to the special interrogatory, the trial court, without ordering a presentence investigation, and without holding a presentence hearing to permit presentation of evidence as to aggravation and mitigation, sentenced the defendant to death. I add here that the then existing statutes did not require a presentence investigation or a presentence hearing. Indeed, it would have been useless to do so, because the statutes required the imposition of the death penalty, and pursuant to the amended information and the jury's answer to the special interrogatory, all that remained was for the court to impose the required death penalty. It was this imposition of the mandatory death sentence that this Court declared unconstitutional in the first *Coleman* appeal. 579 P.2d at 741—742.

It is fair to say that the extraordinary activities of the trial court in amending the information and in submitting the special interrogatory to the jury, suggest at a minimum that he had more than an ordinary interest in setting the stage for the eventual imposition of the death penalty in the event of a conviction on the count of aggravated kidnapping. This then, was the state of mind of the sentencing judge as he again prepared to sentence the defendant after the *first Coleman* appeal.

It is revealing to set forth the background of how the sentencing judge set up the second imposition of the death penalty for the defendant. This Court decided the *first Coleman* case on April 26, 1978, and the petition for rehearing was not turned down until May 30, 1978. But in the meantime, the sentencing court was active. On May 2, 1978, he entered an order (with copies sent to all

counsel of record) that defendant was to be immediately returned to the Custer County jail and held there pending presentencing investigation and sentencing. The sentencing judge simply did not bother to wait until the case had been returned to him after the denial of defendant's petition for rehearing.

On June 2, 1978, the presentence investigation report was submitted to the court with the notation in the report that the sentencing judge "is still awaiting some type of legal papers from the Supreme Court and that sentencing will not be set until such papers arrive."

Apparently the papers arrived that same day, for on June 2, 1978, the sentencing court sent out an order to all counsel of record that the sentencing hearing would take place on June 14, 1978 in the Custer County Courthouse, and that the hearing would be conducted "*in accordance with Sec. 95—2066.6 through 95-2206.11, R.C.M. 1947, as amended*" (the 1977 death penalty statutes). It appears from this that the prosecution had kept the sentencing judge well abreast of the developing law from the United States Supreme Court, namely, *Dobbert v. Florida* (1977), 432 U.S. 282, 92 S.Ct. 2290, 53 L.Ed.2d 344. I have previously discussed in this dissent the point that the trial court ignored the *ex post facto* provision in the Montana Constitution, and section 12-201 of our statutes.

With the decision of the sentencing court from the inception that it would apply the 1977 death penalty statutes, we are now in a position to examine those statutes, sections 95-2206.6 through 95-2206.15, R.C.M.1947 (now sections 46-18-301 through 46-18-310 MCA) and sections 94-5-102 and 94-5-303 (now sections 45-5-102 and 45-5-303 MCA).

Under the 1977 statutes, section 95-2206.6, provides that if there is a conviction in which the death penalty may potentially be imposed, the sentencing judge must conduct a mandatory presentence hearing to determine if any statutory aggravating circumstances exist under section 95-2206.8 and if any statutory mitigating circumstances exist under section 95-2206.9. The scope of the hearing is set forth in section 95-2206.7:

> "*Sentencing hearing—evidence that may be received.* In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

I note in this respect, and I will develop this point later, that an *evidentiary* hearing did not in fact take place. The State presented no evidence in aggravation, apparently content that the sentencing court would later find that the victim died as a result of the kidnapping. But neither did the defendant present any evidence. He did not take the witness stand, nor did anyone else in his behalf, nor was any documentary evidence presented in his behalf. Other than the trial transcript, the only sentencing background the court had was contained in the presentence investigation report.

The statutory aggravating circumstances are set forth in section 95-2206.8:

> "*Aggravating circumstances.* Aggravating circumstances are any of the following:
> "(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.
> "(2)" The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.
> "(3)" The offense was deliberate homicide and was committed by means of torture.

"(4)" The offense was deliberate homicide and was committed by a person lying in wait or ambush.
"(5)" The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.
"(6)" The offense was deliberate as defined in subsection (1)(a) of 94-5-102 and the victim was a peace officer killed while performing his duty.
"(7)" *The offense was aggravated kidnapping which resulted in the death of the victim.*" (Emphasis added.)

For purposes of this case only, subsection (7) (which is emphasized) is important. In specific written findings of fact as to subsections (1) through (6) the sentencing court properly found that the aggravating circumstance did not apply to the facts of this case.

The statutory mitigating circumstances are set forth in section 95-2206.9:

"*Mitigating circumstances.* Mitigating circumstances are any of the following:
"*(1) The defendant has no significant history of prior criminal activity.*
"(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
"(3) The defendant acted under extreme duress or under the substantial domination of another person.
"(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
"(5) The victim was a participant in the defendant's conduct or consented to the act.
"(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

"(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.
"(8) *Any other fact exists in mitigation of the penalty.*" (Emphasis added.)

For purposes of this case only subsections (1) and (8) (both emphasized) are important. The trial court properly found an absence of mitigating circumstances listed in subsections (2) through (7) and entered specific findings as to each negating the existence of the mitigating circumstance. But as I will later develop, the sentencing court totally misapplied the law in relation to subsection (1), and failed to negate the existence of "Any other fact exists in mitigation of the penalty" as provided for in subsection (8).

Explicit findings as to the existence or nonexistence of aggravating circumstances or mitigating circumstances, are mandated by section 95-2206.11:

"*Specific written findings of fact.* In *each case* in which the court *imposes* the *death sentence,* the determination of the court *shall* be supported by specific written findings of fact as to the *existence or nonexistence* of each of the circumstances set forth in 95-2206.8 and 95.2206.9. The written *findings* of fact *shall be substantiated by the records* of the trial and the sentencing proceeding." (Emphasis added.)

The statute supposedly enacted to guide the sentencing court in its decision as to whether or not to impose the death penalty, section 95-2206.10 provides:

"*Consideration of aggravating and mitigating factors in determining sentence.* In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 95-2206.8 and 95-2206.9 and *shall impose a sentence of death if it finds one or more* of the *aggravating circumstances and finds that there are*

> *no mitigating circumstances sufficiently substantial to call for leniency.* If the court does not impose a sentence of death and one of the aggravating circumstances listed in 95-2206.8 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense." (Emphasis added.)

Under this statute, a death penalty cannot be imposed unless there is at least one aggravating factor. But if there is at least one such aggravating factor, it does not require the sentencing court to give any weight at all to mitigating factors. Rather, the sentencing court, in its infinite wisdom, and untrammeled discretion, is permitted to sentence to death if he finds at least one aggravating factor and a thousand mitigating factors. All he must state is that the mitigating factors are "not sufficiently substantial to call for leniency." Under this statute, a defendant is totally at the mercy of the sentencing court as to what weight, if any, it chooses to give to mitigating factors. The only factors which may save a defendant from the death penalty are the identity of the sentencing judge and his personal attitude about whether or not he should impose the death penalty. This is worse than a game of Russian roulette for the defendant does not even get a chance to turn the cylinder to see which judge he draws.

In any event, the above is the statutory scheme under which the judge entered his findings, conclusions, order and judgment, on July 10, 1978. But before discussing his findings, conclusions, order and judgment, the facts surrounding the commission of the crimes are important for several reasons, but primarily for the reason that they show the deep involvement of defendant's accomplice, Robert Dennis Nank, in every facet of the crimes, and yet Nank has avoided the death penalty. The facts I state here are taken from the presentence report filed on June 2, 1978, which were in turn taken from the State's brief on appeal, filed November 17, 1977, with this Court. I quote verbatim from the presentence investigation report:

> "On July 4, 1974 he and Dewey Coleman were sitting in a park in Roundup, Montana. They were

> destitute financially and *made a decision to burglarize a home in Roundup where they sold several rifles, and, at the Roundup airport buried the same.* [As I will later demonstrate, the trial court improperly relied on this in sentencing Coleman to death.] They decided that, because they were destitute financially and low on gas for the motorcycle on which they were traveling, it would be necessary for them to burglarize someone else and to kill them to destroy the evidence. As they proceeded east from Roundup to Forsyth, Nank's motorcycle ran out of gas approximately five miles west of Vananda, Montana. They attempted hitchhiking, but were refused by an elderly couple who stopped to determine what was the matter. This occurred about 10:00 o'clock P.M. Shortly thereafter, Miss Harstad offered the pair a ride and continued easterly down U.S. 12. At a location about nine miles west of Forsyth where Nank, sitting next to Miss Harstad, turned off the key for the ignition and steered the car to a stop. Nank held the girl while Dewey Coleman drove the vehicle back to their motorcycle which was out of gas. They picked up their motorcycle helmets and a rope used to tie luggage to the motorcycle and again proceeded east down U.S. 12. North of Vanada, about a half mile from the highway, the two attempted sexual intercourse with Miss Harstad. Despite her pleas Coleman had intercourse with her. She was in menstruation at the time. Nank also attempted intercourse, but failed because of a lack of penal erection. Nank did assist in holding Miss Harstad while Coleman had intercourse and also gratified his desire to stroke Miss Harstad's feet. Following sexual intercourse they tied Miss Harstad with a rope and traveled in her vehicle with her through Forsyth to Rosebud, Montana and returned west from Rosebud to Forsyth. West of Forsyth they crossed a

bridge over the Yellowstone River and proceeded again east down a dead end road on the north side of the river. Nank carried the girl, now clothed, from the car towards an abondoned Milwaukee Railroad Depot and across the railroad tracks. While Nank held the girl over his shoulder, Coleman came from behind swinging his silver motorcycle helmet by the chin strap and crashed it against Miss Harstad's skull. Nank dropped her to the ground and Coleman proceeded to hit Miss Harstad several more times with the helmet. Since she was not dead, the two attempted to strangle her with a rope. Then Coleman alone attempted strangulation. Thinking she was dead, the two carried her down the embankment in a seclusion of trees and heavy brush and threw her into a puddle of water which was caused by the overflowing Yellowstone River. However, the young lady had not expired and she stood up in the water. At this point, both Nank and Coleman went into the water. *Coleman held her lower body and Nank held her head under water until she was drowned.*" (Emphasis added.)

So far as the *record* is concerned, it is from these facts only that the sentencing court again imposed the death sentence. The findings and conclusions are devoid of any other factors which entered into the decision of the sentencing court.

What did happen at the June 14, 1978 sentencing hearing? The State presented no *evidence* in aggravation; and the defendant did not testify himself or present other testimony, or present documentary evidence. The prosecution tried unsuccessfully to call the defendant to the witness stand. Before the conclusion of the proceedings on that day, however, the presentence investigation report was formally filed by the sentencing court and made an official part of the record. Each party was given an opportunity to examine the parole and probation officer who prepared the report, but each declined. The prosecuting attorney formally declared that, "I have read the report and I don't have any objection to any of the material in the report."

During this hearing, the court commented on one portion of the presentence investigation report in relation to defendant's criminal background, and I will later develop the importance of this comment in relation to the eventual findings of the sentencing court:

> ". . . The significant part of it [the presentence investigation report] relative to mitigating circumstances, is that the defendant has *never been convicted of any felony prior to this charge.*" (Emphasis added.)

Being that neither party presented any formal evidence, it was also agreed that the parties would present to the court through their briefs what they considered to be aggravating and mitigating circumstances, respectively. It appeared that the prosecutor would also present proposed findings and conclusions, but that the defendant did not indicate whether or not he would present proposed findings and conclusions. There is no question, however, that he knew he was given the right to do so. The June 14, 1978 presentencing hearing was then adjourned. The next time the parties would again meet in court was July 10, 1978 when the sentencing judge came to court with his sentence of death in hand.

This Court does not have the briefs that were exchanged between the parties and the court from the time of the June 14, 1978 presentence hearing and the date set for the sentencing. Nor do we have the proposed findings and conclusions submitted to the court by the prosecutor.

On July 10, 1978, the judge came to court with findings, conclusions, judgment and order of execution, already prepared. As a formality, however, the sentencing court permitted defense counsel (and the prosecutor) to make final arguments against and for the death penalty. Insofar as the defendant is concerned, this situation can be likened to permitting final arguments to a jury only after the jury had returned with its verdict. Defense counsel did ask the sentencing court to consider matters contained in the presentence investigation report, including the fact that defendant did not have a previous criminal record before the particular

crimes here, and that the crimes committed were totally inconsistent with his previous behavior as established by residents in Great Falls, Montana, who had known defendant for some time. He also asked the court for leniency because Nank, who was an admitted accomplice of the defendant, had committed exactly the same crimes as defendant, but through plea bargaining and turning state's evidence, was not given the death penalty. He also argued that defendant was not being treated equally by either the prosecutor or the court because he was black, and argued that the judge's orchestration of certain matters during the first trial showed his prejudice. Moreover, defendant again maintained his innocence of the crime.

It was clear that the clean record of the defendant before the crimes involved here, bothered the sentencing court. Not that the court wanted to show leniency because of the clean record, but that the court did not know how to handle the matter. Eventually, the court rationalized defendant's situation to the fact that he had just never been *convicted* of any previous felony:

> ". . . *The only mitigating circumstance is that the defendant had not prior to this time been convicted of a felony, but in view of the enormity of the crime committed, and the Court's feeling that this one circumstance does not overcome the aggravated circumstances,* I have made findings to this effect, written findings as required by law. Also I have made conclusions and judgment which have been furnished to the defendant and the state at this time, and I will only at this time read the Court's conclusions and judgement . . ." (Emphasis added.)

After the sentencing court made this statement, it stated for the record that it would not read its written findings into the record, but would simply read its conclusions and judgment into the record—whereupon defendant was sentenced to death. Before appealing to this Court, defendant petitioned the sentencing court for a reconsideration of the sentence, but was turned down. Automatic appeal to this Court followed, pursuant to the provi-

sions of sections 95-2206.12 through 95-2206.15 (now sections 46-18-307 through 46-18-310 MCA).

Before discussing some of the crucial issues relating to the sentencing itself, the trial court's memorandum in justification of turning down defendant's petition for reconsideration, is revealing. In this petition, defendant contended, among other things that: defendant had a right to present argument to the sentencing court before the sentence of death, and that this right was denied because the court already had its order of execution prepared when the court formalistically allowed defendant's counsel to make his arguments; the sentencing court had failed to take the presentence investigation report into account; the sentencing court had in essence found defendant guilty of previous criminal conduct by relying on the uncorroborated testimony of Nank that he and defendant had burglarized a home in Roundup, Montana, and stole some rifles, on the same day as the crimes involved here; and that the sentencing court totally failed to consider the favorable treatment given to Nank who had admitted the same crimes for which defendant stood convicted.

In its July 31, 1978 order denying the petition for reconsideration of the sentence, the trial court failed to mention any of these arguments, and seemed to ground its order on its conclusion that defendant was merely rehashing old arguments already presented. But the order is revealing for what it says about mitigating circumstances:

> "A pre-sentence hearing was concluded on June 14, 1978, at which time defendant and his counsel were given an opportunity to present any matter in mitigation, *but defendant declined to take the witness stand and failed to otherwise present any evidence in mitigation.*
>
> ". . .
>
> "*The court then prepared its findings and conclusions based upon the aggravating and mitigating circumstances known to the court.* A day for sentencing was then set, at which time counsel for defendant gave a disclosure on matters previously presented by brief to the trial court on the motion to quash, and to the Supreme Court on the appeal.
>
> ". . .

> "Coleman at the sentencing hearing was given the opportunity to present any mitigating circumstances he might choose, but declined to do so, which distinguishes *Lockett* from the instant case. Other than the mention of the *Lockett* case, *the final oral argument of defendant's counsel and the petition for rehearing raise no new matter not previously considered by the court at the time of the preparation of the trial's court's findings and conclusions.*
> "Now, Therefore, It Is Ordered that the petition for rehearing be denied." (Emphasis added.)

The undeniable fact is that other than the circumstances of the crimes as divulged by the trial itself, the only information of record that the sentencing court had before it sentenced defendant to death, was the presentence investigation report. But, the sentencing court totally ignored this report, with the exception of the defendant's criminal background.

The presentence investigation report contained the following subject headings: (a) Criminal History; (b) Official Version of Crime and Defendant's Version of Crime; (c) Physical Description and Condition (of the defendant—this section includes references to several psychological tests and profiles of the defendant; (d) Family and Social Background; (e) Educational and Vocational History; (f) Marital History; (g) Military History; (h) Summary and Conclusion. A sentence of death is immediately suspect when the findings in support of that sentence are entirely devoid of any considerations other than the circumstances of the commission of the crime itself. Not once did the sentencing court refer to the defendant's history or background. It is almost like the sentencing court entered an order for the extermination of an inanimate object, certainly not a living, breathing human being.

Since the sentencing court and the majority opinion provide no facts as to defendant's background, I believe it is imperative to do so. I take this background from the only source there is of record, the presentence investigation report.

Dewey Coleman is a black man, born October 26, 1946, in Missouri, the son of a boilermaker and a housewife. There were nine brothers and sisters in his family. At the age of fourteen, he

ran away from home, but some time later he returned to Missouri. He graduated from high school in 1964. His father died in 1964 and his mother died in 1975, only four brothers and sisters were known by him to be alive. He apparently has had no contact with his family since that time.

From 1965 to 1972, he was in the United States Navy. He was discharged in 1969 but was recalled to active duty very shortly thereafter. He attained the rank of E-5 and was primarily involved in doing clerical work. During this time he also received approximately two years of education at a junior college and through correspondence courses. He received his discharge from the Navy in 1973 and apparently is on disabled classification as a result of a service connected activity.

In 1973, he came to Great Falls, Montana, in part because he wanted to remove himself from the drug scene. He had used drugs on and off since the young age of 12 or 13 when he and his friends smoked marijuana that was growing wild near his home in Missouri. He later became involved with using cocaine, amphetamines and heroine.

Upon his arrival in Great Falls, Montana, he became actively involved with Opportunity Incorporated, a community action low income coalition of individuals who worked for welfare rights and the betterment of low income people. While associated with Opportunity Incorporated he became founder and president of L.I.N.C. (Low Income Neighbors Coalition). He helped organize a Christmas program for low income youngsters in the Great Falls area, and provided the time and initiative to get several projects developed before he left in May 1974 for the Veteran's Hospital in Sheridan, Wyoming.

Insofar as can be determined, defendant had never been convicted of even a misdemeanor charge. Indeed, he had not even been arrested for any offense. The parole and probation officer spoke with several individuals in Great Falls concerning Coleman, and he stated in his report:

> "This writer spoke with several individuals associated with the subject and familiar with his work in the Great Falls area and everyone that I

> talked with was complimentary of this individual's work and viewed with some disbelief the crime this individual has committed."

After his arrest, several persons performed psychological testing of defendant, and their diagnoses ranged from such determinations as paranoid schizophrenia; schizodal personality; organic brain syndrome; depressive reaction; a patient with passive aggressive disorders; and depressive reaction with anxiety (Depressive Neurosis.)

Although the above is not a complete profile of the defendant, I have provided some background so that it can be shown that the findings of the sentencing court are barren of any considerations of defendant's personal circumstances. The findings which were made are meaningless to a reviewing court. We cannot guess at how the sentencing court evaluated defendant's individual circumstances. The United States Constitution will not permit us to guess.

After *Furman v. Georgia* (1972), 408 U.S. 238, 96 S.Ct. 2726, 33 L.Ed.2d 346 was decided, a great many states responded to this decision by enacting mandatory death penalty statutes. The 1973 Montana statutes allowed a consideration of mitigating circumstances, but the 1974 statutes eliminated a consideration of mitigating circumstances, thereby making the death penalty mandatory in certain situations specified in the statutes. However, the United States Supreme Court later decided in a series of cases that mandatory death penalties are unconstitutional. *Woodson v. North Carolina* (1976), 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *Coker v. Georgia* (1977), 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982; and *Roberts v. Louisiana* (1977), 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637. It was on the basis of these cases that this Court in the first *Coleman* case declared Montana's mandatory death penalty statute to be unconstitutional. *State v. Coleman* (1978), Mont., 579 P.2d 732, 741-742.

What the Court stated in *Woodson*, applies, of course, to this case:

> ". . . respect for humanity underlying the Eighth Amendment requires consideration of the

> character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. at 304, 96 S.Ct. at 2991.

By the time this Court had declared the 1974 death penalty statutes unconstitutional (1978), the legislature in 1977 had already enacted new death penalty statutes in response to *Woodson, Coker* and *Roberts*, and in response to *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Jurek v. Texas* (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, and *Proffitt v. Florida* (1976), 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913. In *Gregg*, the court held that the decision to impose the death penalty must be:

> "guided by standards so that the sentencing authority would *focus on the particularized circumstances of the crime and the defendant.*" (Emphasis added.) *Gregg v. Georgia*, 428 U.S. at 199, 96 S.Ct. at 2937.

Any statutory scheme therefore, to meet due process requirements must consider not only the circumstances of the commission of the crime, but also the particular circumstances of the individual defendant.

Though it appears that the 1977 death penalty statutes allows a consideration of the particularized circumstances of the crime as well as the individual circumstances of the defendant, I shall demonstrate from the record that the sentencing court failed to consider and evaluate the individual circumstances of the defendant. Accordingly, the death sentence cannot pass the minimum standards established by the United States Supreme Court.

The statutory scheme enacted by the 1977 legislature is an attempt to comply with the demands of *Gregg*. It attempts to consider *both* the "particularized circumstances of the crime and the defendant." Section 95-2206.8 relates only to the circumstances of the crime—that is, the aggravating circumstances under which the legislature has deemed should merit a consideration of whether or not to impose the death penalty. As far as the facts

are concerned in this case, we are concerned only with one aggravating circumstance set forth in subsection (7), as the sentencing court determined specifically that aggravating circumstances did not exist under remaining subsections (1) through (6). Subsection (7) provides:

> Section 95-2206.8, aggravating circumstances are any of the following:
>
> ". . .
>
> "(7) The offense was aggravated kidnapping which resulted in the death of the victim."

To impose the death penalty at least one aggravating circumstance must be found to exist under the statutory scheme. It was found to exist in this case, and therefore the sentencing court crossed the first hurdle allowing the imposition of the death penalty.

Mitigating circumstances required to be considered are set forth in section 95-2206.9, which contains eight subsections. (I have previously set forth this statute in its entirety.) Subsections (2) through (7) are concerned only with mitigating circumstances surrounding the commission of the crime itself. That is, they do not involve a consideration of the particularized circumstances of the defendant as opposed to the crime itself. The sentencing court entered specific findings negating the existence of any mitigating circumstances under subsections (2) through (7). The sentencing court, however, failed to comply with either subsection (1) or (8). Subsections (1) and (8) involve a consideration of the individual defendant himself. Because the individual defendant was not considered, the minimum requirements of *Gregg* have not been met and the sentence must be vacated.

Subsection (1) requires the court to consider the defendant's past history as far as his involvement in crime. Subsection (8) requires the court to consider any other factor concerning the defendant that may be relevant in the decision-making process as to whether or not to impose the death penalty. I quote again from the statute:

> "*Mitigating circumstances.* Mitigating circumstances *are any* of the following:
>
> "(1) The defendant has *no significant history of prior criminal activity.*
>
> ". . .
>
> "*(8) Any other fact exists in mitigation* of the penalty." (Emphasis added.) Section 95-2206.9, R.C.M.1947.

As I have previously explained, it is the mandatory duty of the sentencing judge to make specific findings of both statutory aggravating circumstances and statutory mitigating circumstances. Moreover, section 95-2206.11, R.C.M.1947, requires that findings be made as to either the existence *or absence* of each aggravating or mitigating circumstance. This duty is imposed on the sentencing court regardless of what evidence may have been introduced by the parties at the presentence hearing. In the case of subsection (1), the sentencing court emasculated the record and the law. In the case of subsection (8), there is an utter failure to show affirmatively that the individual circumstances of the defendant were considered.

How did the sentencing court handle the factual determination of whether defendant had a "significant history of prior criminal activity?" I have previously quoted the sentencing court wherein he acknowledged that he was perplexed or annoyed shall we say, that defendant had no previous record. But one clue is provided by the statements of the sentencing court that he simply only acknowledged that defendant had *no record of a previous felony conviction.* Somehow the sentencing court had to establish that the defendant was a bad person before he committed the aggravated kidnapping, and therefore was beyond redemption. We thus arrive at the findings on this vital issue.

During the trial defendant's accomplice, Robert Dennis Nank, testified that on the same day of the crimes involved here, both individuals burglarized a home in Roundup, Montana, stole some rifles, and later buried them near the Roundup airport. No one else testified to these facts and neither was there corroboration evidence of this testimony—for example, the recovery of the

rifles, etc. But this testimony by Nank was the key to the sentencing court's approach to subsection (1) of section 95-2206.9. Though the findings are convoluted, the effect of the findings is that the defendant *did* have a "significant history of prior criminal activity."

We go first to the presentence investigation report as to defendant's criminal background:

> "FBI records indicate the subject has been found guilty of Deliberate Homicide, Aggravated Kidnapping, Sexual Intercourse Without Consent. Date of arrest: October 24, 1974 in Forsyth, Montana.
>
> ". . .
>
> "The current offenses are the only criminal activities this individual has ever been arrested for according to the FBI sheet submitted to this office. *No other criminal records could be found.*" (Emphasis added.)

In setting forth the facts of the crime, the presentence investigation report did refer to the burglary and theft of rifles from the Roundup house, which information was of course, taken from the State's brief relating to the *first* Coleman appeal.

In entering its findings on the day of sentencing, the sentencing court stated that it was doing so based on the testimony and evidence presented at defendant's trial, and based on the presentence hearing. There is no reference at all to any reliance on the presentence investigation report. Because there was *no evidence* presented at the presentence hearing, it is fair to conclude that the sentencing court relied entirely on the trial testimony in determining whether or not to impose the death penalty.

Accordingly, based entirely on Nank's uncorroborated testimony as to the house burglary and theft of rifles, the sentencing court entered the following finding:

> "1. That on July 4, 1974, the defendant and Robert Dennis Nank were on the road on Nank's motorcycle on a journey which began at the Sheridan Veterans Administration Hospital in Sheridan, Wyoming,

> and continued through various towns in Montana, to Roundup, Montana. *The two men burglarized a home in Roundup, Montana, on July 4, 1974, and stole several rifles which were subsequently buried near the Roundup Airport. . .*" (Emphasis added.)

From this initial finding the court then proceeded to tie it into subsection (1) which requires the sentencing court to determine whether the defendant has a "significant history of prior criminal activity." Accordingly, in his second finding he concluded:

> "That the State has been unable to prove by means of record checks that the defendant has any *other* history of criminal activity. The only *other criminal act which appears in the trial record* in this case *is* the *aggravated burglary of a home in Roundup, Montana,* where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. *By reason of the foregoing, the credit in mitigation* allowed by Section 95-2206.9(1) is *not appropriate to this defendant.*" (Emphasis added.)

Without expressly stating, in legal effect the sentencing court determined that on the basis of Nank's uncorroborated testimony, the defendant *did* have a "prior history of criminal activity."

This conclusion is clearly erroneous. First, the sentencing court had no right to establish a "prior history of criminal activity" based entirely on the uncorroborated testimony of Nank, who by his own testimony, was defendant's accomplice throughout the entire tragic events of July 4, 1974. Second, the effect of the finding, although not expressly stated, is that defendant *did* have a "*prior history* of criminal activity." The acts used to place a blemish on the criminal history of the defendant occurred the same day as the aggravated kidnapping, and even according to Nank, were part of a continuous course of criminal conduct. This was not the legislative intent when it directed the sentencing court to determine under section 95-2206.9(1) if the defendant had a "*prior history* of criminal activity." Events occurring on the same day as the crime in question hardly establish a "prior

history of criminal activity." Indeed, the conclusion reached here is more revealing as to the predispostion of the sentencing court that it is revealing of the previous life patterns of the defendant in relation to his propensity to commit crimes. The findings are totally unsupported by a reasonable construction of the record and interpretation of the law.

Having effectively consigned defendant to the ranks of a previous offender insofar as section 95-2206.9(1) is concerned, the court then entered the following conclusions with relation to aggravation and mitigation:

> "The Court concludes as follows:
>
> "1. That the aggravating circumstances set forth in Section 95-2206.8, paragraph (7) exists for the reason following:
> "That the offense of aggravated kidnapping was committed by the defendant and it resulted in the death of the victim, Miss Peggy Harstad.
> "2. That none of the mitigating circumstances listed in Section 95-2206.9, R.C.M. are sufficiently substantial to call for leniency. That the only mitigating circumstance *technically present* in this cause is that the defendant has *no record* history of prior criminal activity." (Emphasis added.)

This determination, when coupled with the findings, leads inescapably to the conclusion that the sentencing court established a "prior history of criminal activity" of the defendant by convicting him of a house burglary and theft which occurred on the same day as the aggravated kidnapping. Moreover, it is the findings (as opposed to the conclusions) which are controlling for purposes of satisfying sections 95-2206.9(1) and 95-2206.11. The finding was that by virtue of the Roundup burglary and theft ". . . *the credit in mitigation by section 95-2206.9(1) is not appropriate to this defendant.*" This is merely another way of saying that defendant *did* have a "prior history of criminal activity." Because of this clearly erroneous finding, the death sentence cannot stand.

There is, moreover, an even more glaring reason why the death sentence cannot stand—the total failure to adhere to the minimum standards of *Gregg*, that the record affirmatively establish that the sentencing court considered not only the circumstances of the crime itself, but also the "particularized circumstances of . . .the defendant." In this respect, the record us utterly barren, and the death sentence must be vacated.

Since Subsection (1) of section 95-2206.9 relates only to the individual's "prior history of criminal activity" the only remaining section which can possibly apply to the "particularized circumstances of . . .the defendant" is subsection (8) of the same statute. It provides:

> "*Mitigating circumstances.* Mitigating circumstances *are any* of the following:
> "
> "(8) Any other fact exists in mitigation of the penalty." (Emphasis added.)

Clearly, if the demands of *Gregg* are to be met, they must be met under this subsection. Otherwise, the statute itself would be unconstitutional because it did not allow a consideration of the "particularized circumstances of . . . the defendant."

The question we must ask is a simple one: Did the sentencing court consider the "particularized circumstances of . . . the defendant" before reaching the decision to impose the death sentence, and if so, what findings or determinations did it make concerning defendant as an individual?

The only way a reviewing court can tell if the defendant as an individual entered into the decision-making process of the sentencing court, is if the record and findings indicate that has in fact been done. We cannot, in a case involving a sentence of death, assume or presume that it was done.

A reviewing court cannot guess as to whether the sentencing court considered and amply weighed the "particularized circumstances of . . . the defendant." The reason is a simple one: We might make a wrong guess. Indeed, it would appear that section 95-2206.11 was enacted to eliminate that possibility and to provide a reviewing court with the requisite record to review the death sentence imposed. This statute provides in pertinent part:

". . . the determination of the court shall be supported by *specific written findings of fact* as to the existence *or nonexistence* of each of the circumstances . . . set forth in 95-2206.9. [Mitigating Circumstances]. The *written findings shall be substantiated by the records of the trial and the sentencing proceedings.*" (Emphasis added.)

If this statute, when construed along with section 95-2206.9 is to pass constitutional muster under the minimum standards established in *Gregg*, then it is clear that the record must affirmatively establish that the "particularized circumstances of . .the defendant" have been considered. If the sentencing court did not do this, then the death sentence cannot be permitted to stand. The sentencing court therefore is required to make findings concerning the "particularized circumstances of . . . the defendant", and since written findings are required only when a death penalty is imposed, it must explain why it chose to disregard defendant's individual circumstances in determining to impose the death penalty. The findings of the sentencing court must be examined in light of these requirements.

In findings a *through e* of the death penalty judgement, the sentencing court specifically found the absence of mitigating factors (2) through (7) of section 95-2206.9. Subsections (2) through (7) relate only to facts surrounding the commission of the crime itself. On the other hand, subsection (8) is ignored altogether. A reviewing court is left entirely in the dark as to whether the sentencing court even considered the "particularized circumstances of . . . the defendant." In the judgment there is only one reference to subsection [8], and that is included in a general, virtually all-inclusive umbrella finding:

"That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other number paragraphs of Section 95-2206.9, *namely paragraphs (2) through (8). There is, likewise, no evidence of any facts which are operative in this case to mitigate the penalty in this cause . .* " (Emphasis added.)

This finding hardly complies with the requirements of section 95-2206.11, let alone the demands of *Gregg*. We certainly learn nothing about the defendant from that finding.

The sentencing court stated in this finding that the absence of mitigating factors was gleaned from the trial itself and from the sentence hearing. This finding as to subsection (8) of section 95-2206.9 suggests two conclusions, neither of which satisfies the demands of *Gregg*. The first conclusion is that because no evidence was introduced at the sentencing hearing the sentencing court relied entirely on the record of the trial in reaching the decision to impose the death penalty. But there is no evidence in the trial record as to the individual circumstances of the defendant, and even more importantly, if anything concerning the defendant's individual situation was considered as a result of the trial record, we have no idea what it was. For the record is silent as to what, if anything, concerning the defendant, was considered and evaluated. Surely therefore, the sentencing court did not fulfill the demands of section 95-2206.11 or the minimum constitutional requirements of *Gregg*.

A second alternative is that one can be charitable to the sentencing court and conclude that because the presentence investigation report was officially made part of the record at the presentence hearing, the sentencing court would be presumed to have made use of it in determining whether or not to impose the death penalty. But in the record of the sentencing itself there is not one reference to the presentence investigation report, and neither is there a direct reference to it in the written findings and judgement. Again on such an important matter as this Court cannot assume or presume that the sentencing court considered and evaluated the "particularized circumstances of. . . the defendant." It is either in the record and findings or it isn't. It isn't.

The result is that one cannot conclude from either situation that the sentencing court considered and evaluated the "particularized circumstances of . . . the defendant" before reaching its decision to impose the death penalty. This being so, the death

sentence does not meet the minimum standards imposed by *Gregg*, and it must therefore be vacated.

There is no question that the sentencing court failed to comply with sections 95-2206.9, subsections (1) and (7). Its handling of the issue relating to defendant's "prior history of criminal activity" is a mockery. The majority did not reach the issue of whether a "*history of prior* criminal activity" was established by acts committed on the same day as the aggravated kidnapping. It is true that the defendant did not raise this issue, or if he did, it was inartfully obscured in the broadside attack launched against the second imposition of the death penalty; but nonetheless, it was the duty of this Court under automatic mandatory review, to determine this issue.

The same is true of the failure of the sentencing court to comply with the constitutional mandate of *Gregg* to consider the "particularized circumstances . . . of the defendant." Other than a consideration of a "history of prior criminal activity" as mandated under section 95-2206.9(1), R.C.M.1947, the only section that can possibly allow for a consideration of the "individualized circumstances . . . of the defendant" is subsection (8) of section 95-2206.9. Here, there is a total failure of the sentencing court to show this Court what factors it considered and evaluated concerning the defendant as a person. Again, I must state that this issue was only tangentially raised by the defendant, and again it was undoubtedly inartfully obscured in the broadside attack which defendant launched against the second imposition of the death penalty. But again, the statutes mandated that we review the sentence imposed to determine its compliance with the law. Furthermore, the demands of *Woodson* and *Gregg*, leave no alternative for this Court but to determine if the record affirmatively shows a consideration of the "particularized circumstances . . . of the defendant." Since it does not, it is our duty to vacate the death penalty.

The automatic review provisions for death sentences are set forth in sections 95-2206.12 through 95-2206.15, R.C.M.1947 (now sections 46-18-307 through 46-18-310 MCA). Under section 95-2206.13, the imposition of all death sentences in this State requires this Court to review its legality and sufficiency. Section

95-2206.13 sets forth the priority of review accorded to death sentence cases, and in essence states that it shall take precendence over all other cases. Section 95-2206.14 requires that the entire record of the proceedings be forwarded to this Court.

The extent of review required is set forth in section 95-2206.15:

> "*Supreme court to make determination as to sentence.* The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:
>
> "(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> "(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and
>
> "(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

I cannot accept the majority's conclusions that after an examination of subsections (1), (2), and (3) of section 95-2206.15, that the death sentence was properly and justifiably imposed. The majority simply failed in its duties of review.

Conceding arguendo that Nank's uncorroborated testimony was sufficient to establish that defendant committed the house burglary and theft of rifles, the opinion is silent on the question of whether these acts, committed on the same day as the aggravated kidnapping, were sufficient to establish a "history of prior criminal activity." This is not a question of fact. It is a legal question which this Court must answer, and has failed to do so. For this reason, the majority has not complied with section 95-2206.15(2).

Neither has the majority explained whether the record affirmatively establishes that the sentencing court considered and

evaluated the "particularized circumstances of . . . the defendant" in order to be in compliance with section 95-2206.9(8), and the demands of *Woodson* and *Gregg*. Not having done so, it is clear that the majority has not complied with its review duties under section 95-2206.15(2). Under this section the record of the sentencing hearings and judgment must clearly establish the "*existence or nonexistence* of the aggravating or mitigating circumstances . . ." (Emphasis added.) I note that the only reference in the majority opinion to any of the "particularized circumstances of . .the defendant" is in relation to the handling of the "prior history of criminal activity."

Nor can I accept the conclusions of the majority that the death sentence was not, pursuant to section 95-2206.15(1), "imposed under the influence of passion, prejudice, or any other arbitrary factor." the total circumstances do not support this conclusion.

Circumstantially, the conclusion is inescapable that the sentencing court orchestrated the proceedings from the very beginning so that in the event of a conviction of aggravated kidnapping, the death penalty would be imposed. Before trial on the merits, and after defendant had entered his plea of not guilty, and over defendant's objection, the sentencing court on its own motion, amended the charge of aggravated kidnapping to allege that the crime resulted in the death of the victim. At the conclusion of the trial, he submitted a special interrogatory to the jury to ask it to determine whether the aggravated kidnkapping resulted in the death of the victim. As a result of this amended information and special finding of the jury, the sentencing court placed himself in a position to impose the mandatory death penalty which was then required by statute. It matters not that this Court determined the amended information and submission of the special interrogatory to the jury, to be matters of form, and to be ultimately inconsequential because the death sentence was vacated. It certainly demonstrates the state of mind of the sentencing judge.

The same kind of active involvement is evident after this Court declared the mandatory death penalty under the then existing statutes under which defendant was sentenced, to be unconstitutional. Before the sentencing court received the remittitur from

the Court, indeed, before this Court had ruled on defendant's petition for rehearing, the sentencing court had ordered a presentence investigation report and ordered the defendant immediately returned from the state prison to be placed in the Custer County jail. Apparently on the same day as the remittitur was received by the sentencing court, it sent out an order setting a presentence hearing and stated that it would be conducted under the 1977 death penalty statutes. The sentencing judge ignored our decisions on issues three and eleven which clearly indicated that this Court did not contemplate that the death penalty would be a reconsideration upon resentencing. He read in everything he possibly could to construe the first *Coleman* opinion to mean he could apply the 1977 death penalty statutes retroactively.

At the sentencing hearing itself, he accepted and filed the presentence investigation report, but at least as far as the record is concerned, the sentencing court ignored it, and did not consider the "particularized circumstances... of the defendant." He stretched the law to the breaking point to saddle the defendant with a "history of prior criminal activity", a clear misreading and misapplication of section 95-2206.9(1). He allowed final argument on the penalty to be imposed, only after he had predetermined the issue by coming to court armed with his written death sentence. He totally failed to consider the lenient treatment given to Nank who was by his own admissions, an equal participant in the crimes for which defendant was ordered to be hanged. Moreover, Nank had a previous felony record.

If these factors, individually, or at least collectively, do not demonstrate that the sentencing authority was "under the influence of passion, prejudice, or *any other arbitrary factor*" (emphasis added), I do not know what would. It is an easy matter for a reviewing court to find an absence of "passion, prejudice, or any other arbitrary factor" if it views the various factors in isolation, and does not consider them together. But, they must be considered together if meaningful review is to be provided under section 95-2206.15(1). Unfortunately, in this case, these factors were not considered in isolation, let alone collectively.

The only factor considered by the majority is the failure of the prosecution to give the same plea and sentencing considerations

to defendant as he had given to Nank. But the majority has entirely missed the point—for two reasons. First, the sentencing court should have made some mention of the distinctions in the penalties handed out to Nank as opposed to the defendant, but failed to do so. If the sentencing court thought there were legitimate reasons for treating the defendant differently, it was obligated to set forth those facts and reasons justifying the different treatment. This was not done of course. Second, the majority misreads *Gregg* when it cites this case as justifying the different treatments.

The failure to properly apply *Gregg* results from the majority's reliance on the prosecution's brief in relation to *Gregg*. In its brief, the prosecution stated in response to defendant's argument that defendant was the victim of arbitrary and capricious treatment being that Nank was shown leniency:

> "Furthermore, leniency in one case does not invalidate the death penalty in others." *Gregg* 428 U.S. at 199, 224-226, 96 S.Ct. 2909

In its opinion, the majority stated:

> "leniency in one case does not invalidate the death penalty in others." *Gregg*, 428 U.S. at 199, 224-226, 96 S.Ct. 2909.

The State made no effort in its brief to explain or expand upon this interpretation of *Gregg*, and neither did the majority opinion. Suffice to say that *Gregg* does not apply to the facts of this case. It was hardly appropriate for the majority to rely on this statement of the State in its brief as it is nothing more than a continuing and unrelenting effort to salvage the death sentence imposed in this case, without regard to a fair and dispassionate interpretation of the law or facts.

The basic thrust of the statement in *Gregg* was that a defendant handed the death sentence cannot complain that he has been the victim of arbitrary and capricious conduct simply because another defendant, *in another case,* has for some reason been the beneficiary of a prosecutor's mercy. That is a far cry from the situation here where Nank *admitted* committing *precisely the*

same crimes of which the defendant was convicted by a jury. But, Nank was shown mercy: the defendant was sentenced to hang. This can hardly be interpreted as a just and evenhanded application of the law.

On May 7, 1975, Robert Nank agreed to cooperate with the State in its prosecution of the defendant. In exchange for this cooperation, he received certain benefits—primarily a dismissal of the charge of aggravated kidnapping charge which eliminated the possibility that the death penalty would be imposed. Sixteen days later, defendant Coleman, though still maintaining his innocence, offered to plead guilty to the same charges to which Nank had pleaded guilty, but insisted on maintaining his innocence. The State refused his offer. The case against defendant went to trial in essence because defendant refused to admit his guilt. Primarily on the basis of Nank's testimony, he was convicted of all charges, including the crime of aggravated kidnapping.

The majority has grounded part of its opinion on the *first Coleman* case wherein the majority held that it was not improper for the prosecution to refuse to accept defendant Coleman's conditional offer to plead guilty. Although the prosecutor did have the discretion to refuse this conditional plea offer, the consequences which followed are not fair in the slightest degree. Nor should they be tolerated.

Conceding that the prosecutor had the right to refuse the conditional plea offer, it does not establish that the conditional plea offer was constitutionally infirm. At least that is the law of the United States Constitution. In *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, it was held that there is no constitutional error in accepting a guilty plea which contains a protestation of innocence. Accordingly, at least, under the United States Constitution the prosecutor and sentencing court could have accepted the conditional plea of guilty. If they had, the defendant could not later withdraw his plea.

It is important to note however, that the record does not affirmatively establish *why* the conditional plea was not accepted. That is, it does not establish that the prosecutor would have treated defendant just like Nank if he would unconditionally

plead guilty to the charges. We cannot conclude therefore, that the prosecutor ever promised defendant the same treatment as Nank. In terms of plea bargaining the American Bar Assocaition has established its position relating to similarly situated defendants:

> "Similarly situated defendants should be afforded equal plea agreement opportunities." (American Bar Association on Standards for Criminal Justice, Standards Relating to *The Prosecution Function and the Defense Function*, approved draft (1971), at 102.)

There is no showing in the record that the prosecutor ever offered the same terms to defendant as he did to Nank, and yet there is not a better illustration of similarly situated defendants. Under the circumstances of this case, there was a clear affirmative duty for the prosector to establish that he offered the same plea bargain to defendant as he did to Nank. The prosecutor did not and cannot meet that burden.

There is no question that absent Nank's accomplice testimony, the State would have insufficient evidence to convict defendant.. But once it struck the plea bargain with Nank it had the evidence to convict defendant of the charges if the jury believed Nank's testimony. The record establishes, that is, Nank's confession and Nank's testimony at trial, establishes that Nank and defendant committed the same acts against the victim. The effect in terms of sentencing, however, is that because the State could not convict defendant without Nank's testimony, it struck a bargain to keep one man alive in exchange for the possibility of ultimately putting one man to death—the defendant. The jury verdict against the defendant, based on Nank's testimony, set in motion the ultimate imposition of the death penalty. Such disparate results from such similar criminal acts, cannot be countenanced by society, and certainly should never be countenanced by the courts. The majority has performed a great injustice by ratification of this unequal treatment.

There are two procedural matters concerning the sentencing proceedings that need some clarification. The majority has concluded that defendant was not deprived of an opportunity to pre-

sent oral arguments at the presentence hearing, and moreover, that in essence, defendant waived further rights to present meaningful arguments by not presenting proposed findings of fact to the sentencing court after having been invited to do so. On this basis, the majority concludes:

> "Thus, defendant and his counsel had at least two opportunities to submit argument to the Court regarding the death penalty prior to July 10, 1978 hearing, but did not do so."

This conclusion has greatly distorted the realities of the situation.

I have already discussed the proceedings which took place during the so-called sentencing hearing. As neither party submitted any evidence at the presentence hearing, and the only document filed at the presentence hearing was the presentence investigation report, it was agreed that both parties would submit briefs to the sentencing court with regard to their respective positions. This apparently was done, although this Court does not have the benefit of those briefs. In addition, the sentencing court invited both sides to submit proposed findings and conclusions, but only the prosecutor indicated positively that he would do so. The sentencing court did not tell the parties that submission of briefs would constitute a waiver of oral argument concerning the penalty to be imposed. It is logical to assume that before sentencing, defense counsel believed that he would have an opportunity to make a meaningful and effective oral argument against imposition of the death penalty. Clearly, the sentencing court did not comply with the spirit of section 95-2206.7, which provides in pertinent part:

> "... The state and the defendant or his counsel *shall* be permitted to present argument for or against sentence of death." (Emphasis added.)

The word "shall" is mandatory. For it to be meaningful, the implication is that argument shall be presented before the sentencing court makes its decision. But such is not the case here. True, the sentencing court, on July 10, 1978, allowed defense counsel to argue against imposition of the death penalty, and the state to

argue for imposition of the death penalty. But by this time the court had already decided to impose the death penalty. The sentencing court had come to court with its written death sentence already prepared. As I have previously mentioned, insofar as the defendant is concerned, this is akin to allowing defense counsel in a criminal case to make final arguments to the jury only after the jury has returned with its guilty verdict. Under these circumstances, it cannot be reasonably argued that defendant was given a meaningful opportunity to argue against the death penalty when the decision to hang had already been made. This not only violated the spirit of section 95-2206.7, it also constitutes a denial of the effective assistance of counsel.

Nor is it reasonable to conclude as did the sentencing court, and the majority here, that defendant effectively waived another opportunity to argue against the imposition of the death sentence by failing to submit proposed findings of fact and conclusions of law. It is true that the sentencing court invided defense counsel and the prosecutor to submit proposed written findings and conclusions; but only the prosecutor responded that he would do so. The prosecutor did present proposed findings and conclusions. But does the sentencing court truly believe, does the majority truly believe, that the tide could well have been turned for the defendant if only his lawyer had presented proposed findings of fact? How far must we bury our head in the sand?

Indeed, the statute calling for "specific written findings of fact" clearly operates only when a decision is made to take a defendant's life. Section 95-2206.11 provides in relevant part:

> "In *each case* in which the court *imposes* the *death sentence,* the determination of the court will be supported by specific written findings of fact . . ." (Emphasis added.'

This statute leaves no doubt that findings are required only in the event of a decision to impose the death penalty; and the statute certainly places no duty upon the defendant to make those proposals. The duty is that of the court and the court alone to support its death sentence with the required "specific written findings of fact."To impose a duty and burden of persuasion upon

the defendant to present his own proposed findings of fact is clearly beyond the contemplation of the statute, and beyond any duty that this Court should gratuitously impose on the defendant.

What if the defendant's counsel did submit proposed findings of fact? We may safely assume that would have led to the inexorable conclusion that defendant's life should be spared. But, if the sentencing court spared defendant's life, the proposed findings would not serve any function whatsoever. Since the decision to grant mercy is one in which no findings of fact are required, and it also being obvious that the State has no appeal from such a decision, the proposed findings most likely would have found their way to the trash can. Furthermore, the majority ignores the primary function of findings of fact in terms of the decision-making process at the trial level.

If trial judges and trial lawyers are candid, they will admit that proposed findings are prepared and submitted by counsel to assure that in the event the trial court finds in their favor that all the bases are covered in the event of an appeal. They are submitted possibly with the hope, but rarely if ever, with the expectation that the proposed findings will actually be a decisive factor in influencing the trial court to rule in favor of one's client. Indeed, it has been my experience, and an unfortunate one from the standpoint of appellate review, that most often the trial court simply rubber stamps the proposed findings of the winning side. Rarely do we get any insight as to what the decision-making process was, or how the trial court in fact viewed the evidence at trial. In the instant case, I do not know how closely the findings of fact parroted the proposed findings submitted by the prosecutor, as the proposed findings are not a part of the record on appeal.

An examination of the findings entered in this case does not give a reviewing court any insight as to what the fact finder was thinking; that is, what factors were actually involved in motivating and impelling his decision to impose the death penalty. The findings are cold and calculated and set out with staccato precision — but hardly a revelation as to the reasons for concluding the defendant must die. In considering and weighing

the totality of circumstances surrounding the commission of the crimes by defendant, and by Nank, and in considering and weighing the totality of circumstances surrounding the "particularized circumstances of . . . the defendant", what actually impelled the sentencing court court to sentence defendant to hang while at the same time he knew that an equally guilty accomplice would not hang? The record is silent as to these factors—the real reasons hidden forever in the bosom of the court. The findings are more revealing for what they don't say than for what they do say.

It is clear beyond question that defendant's presentation of proposed findings, in addition to not being required, would have been a manifest exercise of futility. Findings of fact collaborated in by a thousand William Shakespeares could not have deterred the sentencing court from its chartered course. Does any member of the majority truly believe otherwise? Under these circumstances to conclude that proposed findings of fact are a form of argument calculated to have and with a reasonable possibility of having a certain persuasive effect on the sentencing court, is utter nonsense.

Before discussing the majority position that only cases involving imposition of the death penalty must be reviewed by this Court, I emphasize that I do not contend defendant would have to be treated exactly like Nank in terms of the sentencing imposed. In the case of Nank, the charge of aggravated kidnapping was dropped as part of a plea bargain agreement and obviously he could not be sentenced at all for that crime. But since defendant was convicted by a jury of three crimes (including, of course, that of aggravated kidnapping), he could have been sentenced for all three crimes. The sentencing court went one step too far when it sentenced the defendant to hang.

One of the purposes of appellate review is as the majority states, "[to] serve as a check against the random or arbitrary imposition of the death penalty", citing *Gregg*, 428 U.S. at 206, 96 S.Ct. at 2940. But *Gregg* did not hold that only other death penalty sentences need be compared. Nor do I believe the Georgia Case relied on by the majority (*Moore v. State* (1975), 233 Ga. 861, 213 S.E.2nd 829) is authority for the majority position in light of the

wording of the statutory review scheme in this state. Section 95-2206.15 does not so limit our review. It provides in relevant part:

> "Supreme Court to make determination as to sentence.
> "The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:
> ". . .
> "(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

If only a comparison with other death sentences was intended, the legislature would have inserted the word "death" before the word "penalty".

If the actual purpose of mandatory review (mandated by the United States Constitution) is to check against "the random or arbitrary imposition of the death penalty", I fail to see how such review can be fairly and effectively fulfilled without a comparison with those cases wherein the death penalty could have been imposed, but for some reason was not. Factors which may lead a sentencing court to not impose the death penalty may well be worthy of consideration by a reviewing court in determining whether a particular case under review merits the same considerations. A sentencing judge may have sound and persuasive reasons why he did not impose a death penalty in a particular case. This court should not deny access to this decision in determining whether or not a case we are reviewing may merit the same outcome.

I am not unaware, however, of the practical problems involved in getting access to such cases. For example, section 95-2206.11, which I have previously discussed in relation to another point, clearly requires "specific written findings of fact" only when the death penalty *is* imposed. If such findings are not entered, and if a decision of a sentencing court is not filed explaining its reasons

for not imposing a death sentence in a particular case, for all practical purposes this Court would be deprived of the benefit of this decision for review purposes. But, I believe that a failure to use such cases for comparison is a denial of effective review, particularly since mandatory review is required by decisions of the United States Supreme Court.

There are additional practical problems in seeking to fairly apply a statutory scheme of capital punishment. The vagaries of the components entering into the decision-making process of the prosecutor and the sentencing judge are too many and mostly never became a matter of record so that a reviewing court can consider them. Whether the death penalty will be imposed in a particular case will depend almost entirely on the personal beliefs and attitudes of the prosecuting attorney and the judge who is on the case. Many prosecutors would be loathe to seek the death penalty. On the other hand there are those who would not hesitate in determining that the death penality is the appropriate and only punishment. The same is true of the judge who is on the case. Many judges would be loathe to impose the death penalty. On the other hand, there are those who are known as "hanging judges". To them, the death penalty should be imposed more often and in a wider variety of cases. Furthermore, there are many political considerations which operate upon prosecutors and judges in determining whether the death penalty will be imposed. A defendant may be sentenced to death solely because the right combination of prosecutor and sentencing judge operated in tandem in reaching the decision to impose the death penalty.

Of course, many decisions are made disposing of the death penalty aspects of a case long before a defendant either pleads guilty to a capital crime or is found guilty by a jury. In many cases, a threat of the death penalty hanging over a defendant may induce him to plead guilty to a crime in exchange for the promise of a prosecutor to eliminate the death penalty aspects of the charge involved, or a promise not to seek the death penalty. It would be extremely difficult, to say the least, for a reviewing court to obtain sufficient information concerning these cases so as to compare them with a death sentence currently under review.

I point out these factors only to stress my belief that it is virtually impossible to rationally and fairly administer and enforce a statutory scheme of capital punishment. But since capital punishment seems now to be an accomplished fact, this Court should spare no efforts in seeing that it is administered as fairly as we are capable of doing it. To use only cases imposing the death penalty as a comparison with a case under review, fails miserably in this objective. Somehow the whole process of meaningful appellate review is diminished.

The majority has dismissed with no meaningful discussion the defendant's contention that a jury should have been allowed to determine whether or not the death penalty should be imposed. Perhaps it is not a consitutional requirement under the United States Constitution, but I am convinced that in the long run, with all the inherent frailties which a scheme of capital punishment entails, a jury will arrive at a more evenhanded application of the law to the facts than will a judge. There are no sound policy reasons why, with appropriate guidelines and instructions, a jury should not be allowed to make that fateful and final decision as to whether a person will live or die. We entrust juries with very important decisions in our legal system; there is no reason why we should not entrust them with this ultimate decision. The ultimate power of life or death should never be reposed in a single perosn as it is under our present statutes.

If a jury had decided this case, I am convinced that it would immediately have recognized the fundamental unfairness of allowing Nank to live but ordering Coleman to die. A jury would have established its own fundamental fairness and sense of justice by deciding that neither should Coleman be compelled to pay with his life. If a jury is the "conscience of the community", there is every reason for allowing this collective conscience to render a final verdict as to life or death.

I arrive now at the final matter for discussion, and that is whether the judge who imposed the initial death penalty should have been permitted to again preside at the second sentencing. This question was not directly raised by defendant, but it was impliedly raised by his contention that he was denied opportunities for effective argument during the proceedings relating to the se-

cond sentencing. Clearly, the sentencing judge should not have presided over the second sentencing. But the problem arises as to the steps to be taken to obtain a new judge for the second resentencing. Plainly stated, there is no procedure other than the sentencing judge voluntarily stepping aside for the second sentencing.

It is clear from the beginning of this case that the sentencing court had an inordinate amount of involvement directed to the ultimate end of imposing the death penalty. By amending the information after defendant had entered his plea of not guilty and over the objection of defendant, and by submitting the special interrogatory to the jury, the sentencing court expressed an undeniable interest in the crime of aggravated kidnapping. A conviction of that crime mandated the imposition of the death penalty. By virture of the amended information and the jury's answer to the special interrogatory, the defendant was then in a position where the mandatory death penalty could be imposed. This involvement continued immediately after this Court declared the 1974 death penalty statutes to be unconstituional when the sentencing court immediately sent a letter to counsel that he would conduct a sentencing hearing under the 1977 death penalty statutes. I have elsewhere related the additional activities of the sentencing court in ultimately deciding to impose the death penalty.

Unfortunately, our present court rules on disqualification do not provide for the disqualifiation of a judge in a situation where a case has been remanded only for resentencing as opposed to a reversal for a new trial. This rule is set forth in 34 St.Rep. 26. In the context of this case, this rule provides only that a party can file a peremptory motion to substitute a judge if this Court has ordered a new trial. There is also a provision for disqualification for cause, but it is extremely difficult to invoke, and rarely is a successful instrument of obtaining a change of judge. There is an argument that the peremptory disqualification rule could be interpreted to apply also to a remand for resentencing, but in any event, defendant did not move to peremptorily disqualify the sentencing judge. Accordingly, that issue is not directly before this Court.

Nonetheless, this case raises some fundamental problems concerning the right to a new judge for resentencing, particularly when the death penalty has already been imposed the first time and there is even the slightest possibility that it will again be imposed. The policy behind the right to a new judge after a *reversal* was stated in *King v. Superior Court, In and For County of Maricopa* (1972), 108 Ariz. 492, 502 P.2d 529, where the Arizona Supreme Court stated:

> "In the case of an appeal, reversal and a remand for a new trial, it is always possible that the trial judge may subconsciously resent the lawyer or defendant who got the judgement reversed. The *mere possibility* of such a thought in the back of trial judge's mind means that a new judge should be found." (Emphasis added). 502 P.2d at 530.

In that case the Arizona Supreme Court was construing a rule of procedure similar to the rule of this state. There is no reason, of course, why this same "mere possibility" would not exist in the case of a remand for resentencing. Without question the "mere possibility" would exist in a case where there was even the slightest possibility that the death penalty could again be imposed upon resentencing. Under these circumstances, there is absolutely no reason why the defendant should have to face the same judge twice.

The problem however is that Montana's rule, like Arizona's, is not self-executing. Unless a trial judge or sentencing judge has a twinge of conscience and voluntarily steps aside, there is no way presently to make him do so. The problem is more complicated here because the defendant did not ask the sentencing judge to step aside. Nonetheless, where such an extreme penalty such as the death penalty is involved, I think it incumbent upon this Court to make our own determination as to whether under the objective reasonable man test, the defendant was deprived of a fair and impartial judge to preside over the sentencing hearing and to ultimately impose sentence.

There is no question that the sentencing court should have known that a reasonable man would look askance at his again

presiding over the resentencing. He should have disqualified himself; but being that he did not do so, this Court should not allow the death sentence to stand based on an application of the reasonable man test. In criminal trials (which obviously must include criminal sentencings) the American Bar Association has adopted standards that provide:

> "The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned." American Bar Association on Standards for Criminal Justice *The Function of the Trial Judge,* (1972), p. 8.

The test for determining when a trial judge should step aside is an objective one, not a subjective one. It has been stated as follows:

> "Would a person of ordinary prudence knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" Thode *The Code of Judicial Conduct—The First Five Years* (1977), Utah L.Rev. at 402.

Although this Court has not adopted this Code of Judicial Conduct, the rule is but a rule of common sense and has existed long before the adoption of the canons discussed in the law review article.

In the case of *In re Hupp's Estate* (1955) 178 Kan. 672 P.2nd 428,432, the Kansas Supreme Court reiterated the rule declared in *Tootle v. Berkley* (1899), 60 Kan. 446, 56 P. 755, where it stated:

> ". . . when circumstances and conditions surrounding litigation are of such nature they might cast doubt and question as to the fairness or impartiality of any judgement the trial judge may pronounce, such judge, even though he is not conscious of any bias or prejudice, should disqualify himself and permit the case in question to be tried before a judge pro tem."

It is true that these cases were decided under circumstances where a party moved at the lower court to remove a judge from a case, but where he refused; or where a party was successful in removing a judge from the bench, but where the other party contended upon appeal that the judge should not have removed himself. But if these rules are to have any substantive meaning, particularly in a death penalty case, it should not be necessary that the defendant have moved to have the judge step aside in favor of another judge. The sentencing court should be ever mindful that this Court will, under the reasonable man test, scrutinize the proceedings, and if we determine that the sentencing judge has failed the reasonable man test, we will remand the case for resentencing and order a new judge to preside.

In a death penalty case, this Court has an overriding duty, regardless of the existing rules of procedure governing the disqualification of judges, to determine if from the entire record and the totality of circumstances, the defendant has had a fair hearing. Here, he clearly did not. I would vacate the death penalty and order that a new judge be called in to preside over the sentencing hearings.

To set forth my positions concerning the sentencing hearing, and more particularly, the written findings of fact entered by the sentencing court, I have of necessity had to quote from many of the written findings. There is always the danger that the reader may conclude that if the written findings were reviewed in their entirety perhaps they would not support my position. For this reason, I have appended to this dissent as Exhibit A, an exact copy of the Findings, Conclusions, Judgement and Order entered by the sentencing court on July 10, 1978, whereby the defendant was sentenced to hang.

For all of the foregoing reasons I would vacate the death sentence imposed in this case, order that a different district judge be called in to preside again at the sentencing of defendant, and further order that the death penalty is not to be considered.

IN THE DISTRICT COURT OF THE SIXTEENTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ROSEBUD

****

STATE OF MONTANA Plaintiff	)	
	)	No. 1083
vs.	)	
	)	FINDINGS, CONCLUSIONS,
DEWEY EUGENE COLEMAN	)	JUDGEMENT AND ORDER
Defendant	)	

****

Pursuant to an Information filed on the 24th day of October, 1974 Dewey Eugene Coleman, defendant herein, was charged with the crimes of Deliberate Homicide, Aggravated Kidnapping and Sexual Intercourse Without Consent. A jury trial commenced October 23, 1975, and continued through November 14, 1975, at which time the Jury returned verdicts of "guilty" on the three counts. On November 21, 1975, this Court sentenced Coleman to the maximum punishment on each charge, that is: The defendant was sentenced to death for Aggravated Kidnapping; he was sentenced to 100 years for Deliberate Homicide; and he was sentenced to 40 years for Sexual Intercourse Without Consent. These sentences were ordered to be served consecutively.

This matter was appealed to the Montana Supreme Court, which in its decision of April 26, 1978, upheld each of the three convictions, but remanded this matter for re-sentencing. The Supreme Court held that there was no showing of the infliction of bodily injury during the course of the rape of the victim, and that, therefore, in the absence of that aggravating circumstance the maximum penalty for the crime is 20 years. The Supreme Court also held that Section 94-5-304, R.C.M. 1947, is unconstitutional because it proscribes a mandatory imposition of the death penalty. The Court rejected the defendant's claim that two jurors were excused for cause of violation of the Witherspoon Rule because of their views on capital punishment. The Court limited its decision

on over turning the death penalty to the absence of procedural requirements allowing the trial Court to consider any mitigating circumstances in its imposition of a penalty under the unconstitutional death penalty statute. The Court stated, as follows:

> "Under this statute, if the court finds, as it did in this case, that the victim of an aggravated kidnapping died as a result of the crime, the convicted defendant must be sentenced to die. There is no provision for the trial court to consider any mitigating circumstances. It only allows the court to determine the aggravating circumstances of death. This is not constitutionally permissable.
>
> To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. See: *Gregg v. Georgia*, (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2nd 859; *Proffitt v. Florida* (1976), 428 U.S. 242, 94 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas* (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. None of those required procedures are present in Montana's death penalty statute as it existed in 1974, nor were they provided otherwise in this case. Thus defendant's death sentence cannot stand."

On the 14th day of June, 1978, a separate sentencing hearing was held to determine the existence or non-existence of aggravating circumstances or mitigating circumstances in line with the provisions of Sec. 95-2206.6, 95-2206.7, 95-2206.8 and 95-2206.9, R.C.M. 1947. At time of the sentencing hearing the defendant filed a Motion to Quash, and when offered an opportunity to present evidence or any matter in mitigation, declined to do so. Following the hearing the court granted the state and the defendant time to file briefs particularly with reference to defendant's Motion to Quash. Briefs and the law having been considered, the trial court addresses the principal legal issues raised.

As noted by Coleman in his appellate brief (pp. 178, 179) Sec. 95—5—304, R.C.M. 1947, originally provided that "A court shall impose the sentence of death following a conviction of g-

gravated kidnapping if it finds the victim is dead as a result of the criminal conduct [unless there are mitigating circumstances."] The legislature amended this section by striking the portion of the language underlined above. This legislative action, made it clear that the sentencing court need not consider mitigating circumstances upon conviction of aggravated kidnapping. As pointed out above the statute as amended was declared unconstitutional in this case, but the Supreme Court in remanding for resentencing did not specifically declare if the trial court could or could not impose the death penalty. Coleman argues that since the mandatory statute was declared unconstitutional, Coleman cannot be sentenced to death under laws enacted after his conviction.

The Supreme Court at page 11 of its opinion indicates that if the death penalty had been imposed under proper procedural safeguards, the sentence would have been upheld. The Court states:

"To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. (citations) None of these required procedures are present in Montana's death penalty statute as it existed in 1975, nor were they provided *otherwise in this case.* (emphasis supplied) Thus defendant's death sentence cannot stand."

The emphasized language strongly suggests that if the sentencing court had observed procedural requirements declared by recent U.S. Supreme Court decisions, the death penalty would have been upheld notwithstanding that Montana's mandatory law was unconstitutional.

The later enactment of Sections 95-2206.6 et seq., spelling out the procedure, should not operate to take away the court's power to impose the death penalty under proper procedural safeguards. The death penalty is an operative fact under the Montana Constitution and Section 95—5—303, R.C.M. 1947, and are not to be ignored because a procedurally defective statute is abrogated and other statutes are substituted therefor. As argued by the State from the *Dobbert* case, the circumstance that the defendent is afforded greater procedural protection by the trial court's utilization of sections 95-2206.6, et seq., does not fall within the prohibition of ex post facto laws.

In summary, the trial court in now pronouncing sentence is in a position to utilize the interim developments in sentencing procedure as reflected in recent U.S. Supreme Court decisions and the Montana statutes enacted in response thereto.

Both parties having been given the opportunity to place before the Court all matters each deemed revelant and competent bearing upon a determination of appropriate sentences to be imposed upon the three guilty jury verdicts rendered, and the Court having reviewed all matters submitted, together with the evidence produced at trial, and after observing the defendant's demeanor during the trial and while testifying on his own behalf, the Court now makes the following Findings, Conclusions, Judgment and Order.

FINDINGS

1. That on July 4, 1974, the defendant and Robert Dennis Nank were on the road on Nank's motorcycle on a journey which began at the Sheridan Veterans Administration Hospital in Sheridan, Wyoming, and continued through various towns in Montana to Roundup, Montana. The two men burglarized a home in Roundup, Montana, on July 4, 1974, and stole several rifles which were subsequently buried near the Roundup Airport. Later in the day the two men decided that they would rob someone along U.S. Highway No. 12 between Roundup, Montana and Forsyth, Montana, and that they would kill the witnesses to destroy the evidence. With the motorcycle alongside the road, they began hitchhiking. A car occupied by a Mr. and Mrs. Paul Koester of Forsyth, Montana, stopped, but were frightened and left hurriedly as the defendant moved to obtain entry into the vehicle. At about 10:00 P.M. Miss Peggy Harstad of Rosebud, Montana, stopped and offered the two men a ride. They took control of her and her automobile, tied her with a rope and took her to a remote section north of Vananda, Montana, where both men attempted to engage sexual intercourse without consent with her. The victim was in menstruation at the time. Holding her upon her back in the rear of the automobile, the defendant engaged in the act of sexual intercourse without consent, while the victim pleaded with

him not to. They drove through Forsyth to a secluded spot adjacent to the frontage road just east of Forsyth, Montana, where Coleman announced his decision to kill Miss Harstad. They then drove back through Forsyth to the bridge on U.S. Highway No. 12 over the Yellowstone River to an isolated area across the Yellowstone River from Forsyth near an abandoned Milwaukee Railroad depot. In this area Coleman initiated the assualt upon the victim by swinging his motorcycle helmet by the chin strap and crashing it against the victim's head. Then the defendant placed the yellow nylon rope around the victim's neck and attempted to strangle her. Then both the defendant and Robert Nank carried the victim down to a slough and the defendant held her under the water. The victim rose out of the water briefly and then both men went to the water and held her under until she expired.

2. That the State has been unable to prove by means of record checks that the defendant has any other history of criminal activity. The only other criminal act which appears in the trial record in this cause is the aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) is not appropriate to this defendant.

3. That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other numbered paragraphs of Section 95-2206.9 namely paragraphs (2) through (8).there is, likewise, no evidence of any facts which are operative to this case to mitigate the penalty in this cause. The Court therefore finds, as follows:

a. That the offenses charged and proven in this cause were not committed while the defendant was under the influences of any mental or emotional disturbance; and

b. That in committing the acts charged and proved the defendant did not act under extreme duress or under the substantial domination of another person, rather the defandant's decision to kidnap, rape, and murder were the result of conscious deliberation and were his independent decisions arrived at despite con-

trary arguments advanced by Robert Nank against the murder of the victim; and

c. That the capacity of the defendant to appreciate the criminalty of his conduct or to conform his conduct to the requirements of law was not substantially impaired; and

d. That the victim was not a participant in the defendant's conduct and did not consent to any of the acts, rather that she resisted, and pleaded with the defendant at various times throughout the course of events which resulted in her death; and

e. That the defendant was not a relatively minor accomplice, nor was his participation in the offense relatively minor, rather that the defendant was the decision-maker and the dominating influence in the criminal acts committed against the victim; and

f. That the defendant at the time of the commission of the offense was 27 years of age.

4. That at the prior sentencing hearing this Court imposed the sentence of 100 years for the crime of deliberate homicide. That at the prior sentencing hearing the Court imposed the sentence of 40 years for sexual intercourse without consent, that these sentences were ordered to run consecutively.

CONCLUSIONS

The Court Concludes as follows:

1. That the aggravating circumstances set forth in Section 95-2206.8 paragraph (7) exists for the reason following:
That the offense of aggravated kidnapping was committed by the defendant and it resulted in the death of the victim, Miss Peggy Harstad.

2. That none of the mitigating circumstances listed in Section 95-2206.9 R.C.M. are sufficiently substantial to call for leniency. that the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity.

From the foregoing findings and Conclusions, the Court now renders its

JUDGEMENT AND ORDER

as follows:

1. The defendant, Dewey Eugene Coleman, having been found guilty of the crime of Aggravated Kidnapping by a jury on

November 14, 1975, and the Court having specifically found beyond a reasonable doubt that the aggravating circumstances set forth in Section 95-2206.8(7) exist in relation to this offense, and that no circumstances exist in mitigation of the penalty, the defendant, Dewey Eugene Coleman, is hereby sentenced to death for the crime of Aggravated Kidnapping. Said punishment is to be inflicted by hanging Dewey Eugene Coleman by the neck until he is dead between the hours of six o'clock A.M. and six o'clock P.M. on the 31st day following the completion of the automatic review of this case by the Montana Supreme Court. The execution of said sentence shall be supervised by the Sheriff of Yellowstone County pursuant to Section 95-2303 R.C.M. 1947.

2. The defendant, Dewey Eugene Coleman, having been found guilty of the crime of Sexual Intercourse Without Consent by a jury on November 14, 1975, the defendant, Dewey Eugene Coleman, is hereby sentenced to be imprisoned in the Montana State Penitentiary for a term of 20 years for the crime of Sexual Intercourse Without Consent.

3. The sentences hereby imposed are to be served consecutively with the sentence of 100 years for Deliberate Homicide which is not disturbed hereby. The defendant is hereby remanded to the custody of the Rosebud County Sheriff to be transported by him to the Montana State Penitentiary to await the final order of this Court pertaining to the execution of the remainder of the sentence herewith imposed. The defendant is to receive credit for time served, from the date of his intial incarceration on these charges on October 17, 1974, to the date of this judgement.

Dated this 10th day of July, 1978.

/s/ A.B. Martin
District Judge

cc: John S. Forsythe

Charles F. Moses

——M——

605P2d1051

ON REHEARING

Decided December 19, 1979
Filed December 19, 1979

SHEEHY, Justice

On June 20, 1979, we handed down our opinion on the second appeal of Dewey Eugene Coleman (1979), Mont.,——P.2d——, 36 St.Rep. 1134. Following the opinion, we received the decision of the United States Supreme Court in *Sandstrom v. Montana* (1979), ——U.S.——,99 S.Ct. 2450, 61 L.Ed.2d 39. Counsel for Coleman filed with us a petition for rehearing on the second appeal, alleging, among other things, that the holding in *Sandstrom* required a reversal and a new trial in Coleman's case. On the basis of *Sandstrom*, we granted the petition for rehearing, and further permitted argument on eight other grounds urged by Coleman for rehearing. The issues raised by both sides were briefed and argument was had on rehearing before us on October 29, 1979.

We now uphold the judgement of conviction against Dewey Eugene Coleman, and the sentence of death imposed on him. We will discuss our reasons under the issues as they were briefed and argued before us.

1. *THE EFFECT OF THE SANDSTROM DECISION.*

In *Sandstrom*, the United States Supreme Court found the trial court's instruction "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutional. ——U.S. at——, 99 S.Ct. at 2453, 61 L.Ed.2d at 44.

The Supreme court held that such an instruction may have been viewed by the jury as an "irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions, . . . unless *the defendant* proved the contrary by

some quantum of proof...." *Sandstrom*, ——U.S. at——, 99 S.Ct. at 2456, 61 L.Ed.2d at 47.

The instruction to which Coleman objects on the basis of *Sandstrom* is the trial court's instruction no. 22 as follows:

> "If you find that the defendant Dewey Eugene Coleman committed a homicide and no circumstances of mitigation, excuse or justification appear, then you may infer that the homicide was committed knowingly or purposely."

The objections by Coleman to instruction no. 22 may be summarized as follows: (1) the instruction was in the nature of a *Sandstrom* instruction; (2) this Court has held that *Coleman* instruction is similar to the *Sandstrom* instruction (*State v. Sandstrom* (1978), Mont., 580 P.2d 106, 35 St.Rep.744); (3) under instruction no. 22 the State was not required to prove every element of the alleged crime beyond a reasonable doubt; (4) a statutory presumption is unconstitutional unless it can be shown that the presumed fact is more likely than not to flow from the proved fact upon which it depends; (5) instruction no. 22 conflicts with the defendant's presumption of innocence because where intent is an element of the crime it cannot be taken from the jury through reliance on a presumption; (6) therefore, the State was not required to prove its case against defendant beyond a reasonable doubt.

[30] We first note that the instruction in *Coleman* differs from the instruction given on *Sandstrom* in that the *Coleman* instruction is not mandatory in its terms. The permissive nature of the language "you may infer" cannot be escaped. The question then becomes whether the permitted inference, when read with the other instructions in the case, allowed the State to convict Coleman without proving every element of the offenses charged beyond a reasonable doubt.

Moreover, the *Sandstrom* instruction related to a presumption as a matter of law. The *Coleman* instruction refers to an inference of fact, a deduction that logically could be inferred by the jury under proof of the circumstances stated. The possible inference, by its terms is not in itself unreasonable.

The United States Supreme Court said in *Sandstrom* that determining whether the State has been relieved of its burden of proof, "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instruction." *Sandstrom*, ——U.S. at——, 99 S.Ct. at 2454, 61 L.Ed.2d at 45.

A review of the instructions given by the trial court shows that instruction no 22 did not stand alone on the burden of the State to prove the elements of the offenses charged. At the outset, the Court informed the jury, "[t]he State is required to prove, beyond a reasonable doubt, all material facts alleged in the information filed in this case."

Further instructions of the court hammered home to the jury the importance of the presumption of innocence. In court's instruction no. 3, the jury was told that the defendant came into court protected by the presumption of innocence as to any crime, and particularly the crimes charged against him; that he was presumed to be innocent until his guilt is established to a moral certainty beyond a reasonable doubt; that the presumption of innocence attended him at every step and throughout the entire case and that he was entitled to the benefit of that presumption upon every question of fact; and that the jury should determine his guilt or innocence by a careful consideration of all the evidence introduced in the case during the trial.

In instruction no. 4, the trial court told the jury that the burden of proof rested upon the state throughout the trial to establish the guilt of Coleman beyond a reasonable doubt and that his conviction would not be warranted unless the burden was sustained.

In instruction no. 5, the jury was told the defendant in a criminal action is presumed to be innocent until the contrary is proven, and in case of reasonable doubt whether his guilt is satisfactorily shown, he was entitled to an acquittal; that the effect of this presumption was to place upon the State the burden of proving the defendant guilty beyond a reasonable doubt.

Although Coleman was convicted of three separate crimes, the disputed instruction relates only to the charge of deliberate

homicide. We find that the trial court fully informed the jury in the foregoing instructions about the burden of proof resting upon the State as to each material element of the crimes charged and the abiding effect of the presumption of innocence throughout the course of the trial. We look now to determine the effect under the instructions of the language in the disputed instruction that the jury might "infer that the homicide was committed knowingly or purposely".

An inference is a form of evidence defined as "indirect evidence". Section 26-1-102(4), MCA. To a layman, perhaps, indirect evidence is better known as "circumstantial evidence".

In trial court's instruction no. 8, the jury was instructed that there were two classes of evidence upon either or both of which if adequately convincing, the jury might lawfully find the accused guilty of crime. One was direct evidence, and the other was circumstantial evidence. A part of the court's instruction no. 8 with respect to circumstantial evidence told the jury:

> "All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions, or other circumstances tending to prove a crime in question, it may be considered by you in arriving at a verdict. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in these instructions. However, you are instructed that you are not permitted on circumstantial evidence alone to find the defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime but are inconsistent with any other rational conclusion."

When we give careful attention to the words spoken to the jury, as the United States Supreme Court said in *Sandstrom*, the foregoing instruction with respect to the effect of circumstantial evidence must be weighed with the disputed instruction that the jury "may infer" material elements of the crime. On balance, it is clear to us that the permissive language in the disputed instruction must under any fair reading give way to the positive declaration in instruction no. 8 that circumstantial evidence must carry the convincing quality required by law as stated in the instructions, and that any such inference standing alone would be insufficient unless it was inconsistent with any other hypothesis than guilt.

[31] On appeal, we view the instructions as a whole. *State v. Farnes* (1976), 171 Mont. 368, 558 P.2d 472. It is impossible to deliver the whole of the law in any one instruction, and for that reason, all instructions are considered as a whole and if they fairly tender the case to the jury, the fact that one instruction standing alone is not as full or accurate as it might be is not reversible error. *State v. Caryl* (1975), 168 Mont. 414, 543 P.2d 389. The purpose to commit a crime, or knowledge that one is committing a crime, are subjective matters that most often can be proven only through circumstantial or indirect evidence.

[32] The holding in *Sandstrom* is not to be construed to mean that whenever a trial court instructs the jury that it may resort to inference to determine subjective matters such as knowledge or purpose, that thereby the State has been relieved of its burden of proof. The United States Supreme Court did not intend such limitation, and we do not find any such intention in the language of *Sandstrom*, or its related cases. The jury was not allowed to rest solely upon the permitted inference in the *Coleman* case, but under the instructions had to require such an inference to meet the standard as beyond a reasonable doubt.

The true test under *Sandstrom*, in determining the effect of an instruction such as the one disputed here is whether that instruction has the effect of allocating to the defendant some part of the burden of proof that properly rests on the State throughout the trial. See *Holloway v. McElroy* (D.Ga. 1979), 474 F.Supp. 1363, 1368. We do not find that to have occured here.

On that basis we distinguish the *Coleman* instruction from those cases involving a burden-shifting presumption as in *Mullaney v. Wilbur* (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508; and conclusive presumptions like those involved in *Sandstrom*, supra; *Morissette v. United States* (1952), 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; and *United States v. United*

States Gypsum Co. (1978), 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854. Instead, the inference is purely permissive, in the sense described in *County Court of Ulster City v. Allen* (1979), ——U.S.——, 99 S.Ct. 2213, 60 L.Ed.2d 777.

[33] Coleman further contends that because we stated in our first *Sandstrom* opinion (*State v. Sandstrom* (1978), Mont., 580 P.2d 106, at 109, 35 St.Rep. 744, at 748) that the instruction in *Coleman* was similar to the *Sandstrom* instruction that thereby the United States Supreme Court in overruling *Sandstrom* has in effect determined that the *Coleman* instruction was likewise unconstitutional. We do not accept that contention as having any validity. Comparing each instruction, we see this manifest difference: The *Sandstrom* instruction is by its terms mandatory but the *Coleman* instruction is permissive. We can see no other construction as to the effect of the language used in instruction no. 22 in this *Coleman* Case.

2. THE EFFECT OF THE INSTRUCTION ON "KNOWINGLY."

Here Coleman attacks the definition of the term "knowingly", as given by the Court in instructing on that element regarding the crimes charged.

In trial court's instruction no. 26, the jury was told:

> "'Knowingly'. A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as 'knowing' or 'with knowledge' have the same meaning."

The objections to this instruction on rehearing are: (1) it violates the rule against reasonable doubt because it requires only a "high probability of its existence;" (2) it is in effect an exclusive presumption in that the element is established if the jury finds a high probability of its existence; and (3) "high probability" does not have that quality which would enable a jury to convict.

Under *United States v. United States Gypsum Co.*, supra, where a defendant's state of mind or intent was an element of an antitrust offense, a reliance by a jury on a legal presumption of wrongful intent from proof or effect on prices necessitated reversal. Applying the rationale of *United States Gypsum Co.*, defendant contends that Montana's statutory definition of "knowingly" is established if a jury finds "a high probability of its existence". This, Coleman contends, does not equate with proof beyond a reasonable doubt as an essential element of the crime charged.

[34] In the original *Coleman* opinion from this Court, (1978), Mont., 579 P.2d 732, 35 St.Rep. 560, we considered this argument. There we rejected the contention. Consideration by us of the renewal issue on rehearing is proper, since it was not addressed in our second *Coleman* opinion of June 20, 1979, supra, and the *Sandstrom* decision intervened between our said decision and the rehearing.

The statute on which the instruction is based, section 45-2-101(27), MCA, defines "knowingly" as follows:

> "'Knowingly'—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as 'knowing' or 'with knowledge' have the same meaning."

The statute considers two elements of knowledge as far as this case is concerned, (1) knowledge as to the conduct itself and, (2) knowledge as to the result of that conduct. It is only the *result* of the conduct that hangs on the proof of its awareness that "it is highly probable that such result [would] be caused by his conduct."

[35] The evil countermanded in *Sandstrom* and again in *United States Gypsum Co.*, is instructing the jury in such a manner that the function of fact-finding is invaded by the court. It is when the instructions take away from or intrude upon the duty of the jury to find intent that the instruction becomes constitutionally impermissible for "'A conclusive presumption [of intent], which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.'" 483 U.S. at 446, 98 S.Ct. at 2878; *Morissette,* 342 U.S. at 275, 72 S.Ct. at 256.

[36] When the holdings in *Sandstrom* and *United States Gypsum Co.* are understood in that context, one may examine the instruction on "knowingly" complained of here, and determine that the fact-finding duty of the jury is not invaded by the Court. The District Court is not usurping a jury function when it instructs "a person acts knowingly with respect to the result of conduct [constituting a crime] when he is aware that it is highly probable that such result [would] . . . be caused by his conduct." The jury is not called upon to determine "high probability" in place of "reasonable doubt"; rather it is called on to determine the existence of defendant's *awareness,* beyond a reasonable doubt, that a high probability is that the result of his conduct makes his conduct criminal. The district Court here did not, by using this instruction, make it mandatory upon the jury to find defendent's *awareness,* nor conclusively presume his *awareness.* That finding was left exclusively to the jury. In short, the instruction did not establish a presumption which testimony could not overthrow. On that basis, therefore, we find no merit on the second ground of attack.

[37] Montana has the right and authority to define crimes and their elements. See *Patterson v. New York* (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281. It is consistent with modern concepts of intent to define knowledge as an awareness of probable consequences. The Unites States Supreme Court said in *United States v. United States Gypsum Co.,* supra, 438 U.S. at 444-45, 98 S.Ct. at 2877, with respect to intent under antitrust laws:

> ". . . we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.
>
> "Several considerations fortify this conclusion. The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.
>
> > "'[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or ommission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knew that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.' (Citing authority.)
>
> "Generally this limited distinction between knowlege and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the result.' (Citing authority.) In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment. (Citing authority.)"

3. DISTINCTION BETWEEN EX POST FACTO AND RETROACTIVE RESTRICTIONS

Nothing in the briefs or on the rehearing has been brought to our attention requiring us to expand our discussion of these issues in our opinion promulgated June 20, 1979, except for the citation by Coleman of *State v. Collins* (La.1979), 370 So.2nd 533, and *Miller v. State* (Tenn.1979), 584 S.W.2nd 758.

In *State v. Collins*, the Louisiana Court decided, on retroactive grounds, without specific reference to *ex post facto* effect, that the application of the death penalty was barred by a Louisiana statute similar to that of Montana, that no section of the revised statutes is retroactive unless expressly so stated. The defendant there committed the offense of first degree murder at a time when the first degree murder statute provided that whoever committed the offense must be punished by death. Following the United States Court decision in *Roberts v. Louisiana* (1976), 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, Louisiana enacted new statutes effective 21 days after the offense here was committed, "redefining the crime of first degree murder and enacting a permissive, and presumably constitutional, death penalty . . ." 370 So.2d at 534. It appears therefore that Louisiana not only redefined the punishment for murder, but redefined the crime. In Montana, the legislature took only the procedural step of redefining the punishment. On that basis, as our earlier discussion respecting *ex post facto* and retroactive provisions disclose, *State v. Collins* is distinguishable from the case at bar.

Similarly, there is a distinguishing factor in *Miller v. State*, supra. The Tennessee constitution has a provision which states:

> "That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no *Ex post facto* law shall be made." 584 S.W.2d at 761.

It is obvious that the Tennessee court, under that State constitutional provision, could only decide that laws providing for punishment but enacted after the crime could not be retroactively applied.

It should be noted that the Tennessee court in *Miller* agreed with our determination of the effect of *Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 1 L.Ed. 648, as to retroactivity and the four broad classifications of (1935), 116 N.J.L. 48, 181 A. 706. See 584 S.W.2d at 761.

We note in passing that in *Smith v. Com.* (1978), 219 Va. 455, 248 S.E.2d 135, where Virginia's 1975 death penalty statute was presumptively valid in spite of the United States Supreme Court decisions attacking the constitutionality of similar death penalty statutes and a 1977 Virginia law amending the death penalty statute was applied to uphold a previous death penalty; the Virginal Court found that the 1977 changes were ameliorative. It found so because the 1977 law provided an alternative penalty provision instead of the mandatory penalty provision of the 1975 law. This was the same situation as occurred in Montana. Relying on *Dobbert v. Florida* (1977), 432 U.s. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344, the Virginia Supreme found no *ex post facto* violations since the defendant had "'fair warning' of the consequences of murder." 248 S.E.2d at 147. The Virginia court found that the changes were ameliorative and merely procedural.

Since we find no compelling reason to reverse our opinion respecting the application of the 1977 Montana death statute, we hold to what we said on that subject in the opinion promulgated on June 20, 1979.

4. *THE NEW MONTANA CAPITAL PUNISHMENT STATUTES ARE UNCONSTITUTIONAL.*

[38] The force of Coleman's argument here is that section 46-18-305, MCA, formerly sectgion 95-2206.10, R.C.M. 1947, provides that the sentencing court, in a death penalty case, can only consider those "mitigating circumstances sufficiently substantial to call for leniency." Coleman contends that such language limits the court's discretion only to circumstances "sufficiently substantial" and is not within the holding *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, that the sentencing body must not be precluded from considering any aspect of the defendant's record or character as a mitigating factor.

To state the converse of Coleman's position on this issue is to refute the argument. A sentencing court should not rely on

"mitigating circumstances sufficiently substantial to call for leniency." The only limit placed upon the court's discretion under setion 46-18-305, MCA, is that the mitigating factor must be substantial; that is, it must have some substance or weight. We cannot regard the statutory language requiring a *sufficiently substantial* mitigating factor as a limiting encroachment upon the discretion of the judge when he passes sentence in capital cases.

5. *Whether Coleman's Death Sentence is Disproportionate to His Crime, What is the Scope of this Court's Review, and Coleman's request for a Further Review of Comparative Cases.*

We lump the foregoing issues raised on the petition for rehearing together because they can be more easily answered as one subject.

First we refer again to the developments that occurred after the decision in *Furman v. Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, wherein it was held that a statutory system which allows the sentencing authority unbridled discretion in the process of imposing the death penalty violated the Eighth and Fourteenth Amendments.

It was the *Furman* decision that brought about eventually the recodification of Montana's law so as to replaced the mandatory death penalty with sentencing provisions which gave the sentencing judge alternatives to follow in pronouncing sentence. Under *Jurek v. Texas* (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929; *Proffitt v. Florida* (1976), 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; and *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, it is clear that *Furman* does not require that all sentencing discretion of the trial court be eliminated if the statutory system provides adequate standards to guide the exercise of the discretion in sentencing in capital cases.

Montana's response was the adoption of sections 46-18-301-310, MCA, inclusive. Those sections guide the discretion of the District Court both as to aggravating circumstances and mitigating circumstances in passing sentence. The District Court may impose its sentence of death if it finds one or more of the aggravating circumstances described and also finds there are no

mitigating circumstances sufficiently substantial to call for leniency. Findings of fact are required of the District Court and automatic review by the Supreme Court in all death sentences is also provided.

The duties of our Supreme Court with respect to death sentences is set forth in section 46-18-310, MCA. Under that statute, this Court shall determine:

> "The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine: "(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor:
> "(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 46-18-303 and 46-18-304; and
> "(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

Coleman makes two arguments respecting our review, (1) that we have not reviewed the "entire record" under section 46-18-308, MCA, because we have not reviewed, Coleman contends, the issues raised on his first appeal and (2) that we have not reviewed all the appropriate "similar cases" under section 46-18-310(3), MCA.

Needless to say, when the matter came to this Court for automatic review after the death sentence was reimposed, there came with it not only the record of the resentencing, but the entire record of the trial. We also had before us the briefs and records that related to the first opinion. It should be understood, therefore, that in connection with the second opinion promulgated June 20, 1979, supra, that we have in fact reviewed the entire record.

[39, 40] Further we see no reason to change our position with respect to the similar cases that we looked at in order to determine whether or not the death sentence in *Coleman's* case was disproportionate. We take our duty to be, in connection with whether a death sentence is disproportionate, that we should review the circumstances of the crime of which the defendant is accused, and in the light of those circumstances, the judgement and the sentence thereupon imposed; and examine cases involving similar crimes, all for a single purpose, to make certain that as far as the defendant in this case, Coleman, is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. We find this to be true in this case. It should be understood that in the final analysis, the imposition of sentence is not one that this Court must undertake. That matter is still reserved under our statutes to the District Courts. There is a discretion vested in the District Court in capital cases as to whether the death penalty should be imposed. Once that discretion has been exercised, and if we find that it has been exercised fairly, indiscriminately and in accordance with the applicable statutes, then it must be upheld. the search for disproportionateness involves elements that consider the gravity of the crime, the brutality with which it may have been committed and the factors, if any, which lead to a call for leniency. We look for the even-handed application of death sentences without regard to sex, color, creed, or race, or any other discriminating consideration. When we find that this has occurred, as we find here, our course under the law is to uphold the decision of the District Court.

6. *Hanging as Cruel and Unusual Punishment.*

[41, 42] Coleman's contention here is that hanging, even if carried out exactly, so that death results from a broken neck, is cruel and unusual punishment.

The State responds that there is no evidence in this case that shows that death from hanging, when properly carried out, is anything other than swift and immediate, or that hanging results

in any more suffering than that associated with electrocution or other modes of execution.

Hanging is the only kind of execution provided by Montana statutes. The legislature has not seen fit to change it, although several attempts in recent years have been made to eliminate capital punishment altogether. In that limited sense, the legislature has made a choice to continue the present provisions. We have no power to change these settled provisions of the law, nor can we say that hanging is constitutionally cruel and unusual.

7. *Disposition.*

This opinion in addition to our opinion handed down June 20, 1979, constitutes our decision in this case.

Let remittitur be issued from this Court to the District Court for the purpose of resetting the execution date, and complying with our opinion and order promulgated June 20, 1979.

HASWELL, C.J., and DALY and HARRISON, JJ. concur.

SHEA, Justice, concurring in part and dissenting in part:

I concur in the conclusion reached by this Court that the so-called *Sandstrom-type* instruction given in this case was not error. As the Court reasons, the instruction is substantially different than that which was given in the *Sandstrom* case. On the other hand, I do not believe that it was a model instruction which should be given as a matter of course in criminal trials.

One of the reasons this Court granted defendant's petition for rehearing was to consider the impact of the decision of United States Supreme Court in *Sandstrom v. Montana* (1979), ——U.S.——, 99 S.Ct. 2450, 61 L.Ed.2d 39. We have, moreover, sinced hearing this case on petition for a rehearing, concluded that defendant Sandstrom is entitled to a new trial based on the opinion of the United States Supreme Court that we cannot do otherwise unless we find that beyond a reasonable doubt, the error is harmless. Using that standard, we could not determine that the error in giving the instruction was harmless. *State v. Sandstrom* (1978), Mont. 580 P.2d 106, 35 St.Rep 744. We therefore ordered a new trial.

Although the instruction given in defendant *Coleman's* case was not a *Sandstrom-type* instruction, I believe that the court has omitted the strongest fact as to why the instruction, even assuming it was a carbon copy of that given in *Sandstrom*, was harmless error. The simple fact is that defendant Coleman testified that he was not present during the homicide; he had nothing to do with it; and, indeed, that he did not know that Nank planned to kill Miss Harstad. In essence, the defense was alibi. In *Sandstrom*, on the other hand, the defendant admitted the killing, but his defense was that he did not intend to kill. There is a world of difference in these two defenses and so is there a world of difference as to the potintial impact of a *Sandstrom-type* instruction.

In the *Coleman* case, Nank testified in lurid detail concerning his and defendant Coleman's plan to kidnap, rape, and kill Miss Harstad. The jury was thus given two clear choices: To believe Coleman's alibi defense and thus conclude that Nank alone planned to and killed Miss Harstad; or, on the other hand, to believe Nank's testimony which implicated Coleman in a deliberate design to kidnap, rape, and kill Miss Harstad. Nank's testimony, combined with the corroborating evidence implicating Coleman in the crimes involved, is sufficient beyond a reasonable doubt, to permit a jury conclusion that Coleman was guilty of the crimes for which he was convicted. Under these circumstances, once the jury chose to believe Nank (which, of course, also implies a determination that Coleman was lying), no presumption or no inference was needed to help the prosecution's case along. For this reason, I have no trouble in concluding that even if the instruction was a carbon-copy of the instruction forbidden by the *Sandstrom* case, the error, beyond a reasonable doubt, was harmless.

The majority has embellished to an extent upon its original opinion concerning the other issues decided in the original case, and I emphasize that I do not agree with these statements and conclusions.

In the last paragraph of its opinion here, the Court has stated that its Opinion dated June 20, 1979, together with the Opinion issued today, shall constitute the opinion in this case. I dissented

to the majority opinion and I state here that such dissent shall also constitute my views on the questions surrounding the imposition of the death penalty in this case. Nank's bargain with the State saved his own life; but this very same bargain sealed Coleman's date with the executioner. No court should sanction such disparate results arising from the commission of the same crimes. The tragedy of the senseless killing perpetrated by Nank and Coleman is only compounded by the senseless killing of Coleman which this Court today sanctioned.

4. March 21, 1980. Order Denying
Sentence Review
(unreported)

In the Supreme Court of the State of Montana

No. 80-89

STATE OF MONTANA EX REL.
DEWEY EUGENE COLEMAN, Petitioner

v.

SENTENCE REVIEW DIVISION
OF THE SUPREME COURT OF MONTANA, Respondent.

ORDER ON APPLICATION FOR WRIT OF SUPERVISORY CONTROL

In an original proceedings before this Court, relator Dewey Eugene Coleman petitions for a writ of supervisory control addressed to the Sentence Review division of the Supreme Court.

Coleman was found guilty of (1) deliberate homicide, (2) aggravated kidnapping, and (3) sexual intercourse without consent on November 14, 1975 and judgement was entered against him by the District Court, Sixteenth Judicial District, Rosebud County, Montana. He was sentenced to hang on the aggravated kidnapping charge, to 100 years in prison for deliberate homicide, and 40 years on the intercourse charge.

He has twice appealed to this Court. In the second appeal on June 20, 1979, in *State v. Coleman*, —Mont.—, 605 P.2d 1000, 36 St.Rep. 1134, we affirmed all such sentences, and later denied rehearing after oral argument in our decision found at (December 19, 1979), —Mont.—, 605 P.2d 1051, 36 St.Rep. 2237.

Following the denial of his petition for rehearing, relator petitioned the Sentence Review Board applying for sentence review of all three sentences imposed upon him. On February 26, 1980, the Sentence Review Board denied such review. Thereupon the relator petitioned us in this cause asking us to order a review of his sentences by the Sentence Review Board.

Relator's contentions here are that the forms for sentence review were given to him by the Clerk of the District Court and

a deputy sheriff of Rosebud County, Montana; that his application for review was denied without argument or hearing; that he relied on the agents of the state who gave him instructions on how to file for review; that the statute (section 95-221, R.C.M. 1947) in effect at the time of his crime (since amended) provided for review; that review was granted in Montana to a similar defendant in *State v. McKenzie* (1977), 171 Mont. 278, 557 P.2d 1027; that two of his sentences entitle him to review; that this Court did not review similar cases when it reviewed his death sentence; and that he has been deprived of due process and the equal protection of the law.

The review application by relator was denied by the Sentence Review Division on the ground of lack of jurisdiction. It pointed out that review of sentences is abailable only to persons sentenced to a term of one year or more in the state prison, section 46-18-903, MCA, and that it had no jurisdiction to review death sentences. It also pointed to section 46-18-307, MCA, which provides for automatic review of death sentences by the Supreme Court.

We hold that the denial of review by the Sentence Review Division was correct. With respect to the death sentence, the only statutory agency with power to review is this Court. We have fulfilled our duties in that connection. It would not only be extra-statutory but an anomaly were we to hold that the conclusions of this Court on review of death sentences were subject to later review by the Sentence Review Division of this Court.

At this moment the relator is under sentence of death for aggravated kidnapping. As long as that sentence remains in force, it would be a useless act for the Sentence Review Division to undertake review of the jail terms on the other two charges on which relator was convicted. Because we understood that relator intends to petition some federal court with respect to his death sentence, we will hold in abeyance his sentence review on the jail time until such time, if ever, as it would appear appropriate to allow such a review.

THEREFORE, IT IS ORDERED:

1. The relator's petition for a writ of supervisory control in this cause is denied.

2. This order is without prejudice if at some future date it appears that his death sentence is no longer in force and an otherwise proper application for sentence review is made by relator.

3. Copies hereof shall be mailed by the Clerk of this Court to the relator's attorneys of record, the Attorney general of the State of Montana, the County Attorney of Rosebud County, Montana, and the Clerk of the District Court of the Sixteenth Judicial District, Rosebud County, Montana.

DATED this 21st Day of March, 1980.

Frank I. Haswell

Chief Justice

John Conway Harrison

John C. Sheehy

Gene B. Daly

Justices

5. Information as amended by District Court

(DISTRICT COURT)

(CAUSE) **INFORMATION**

John S. Forsythe, County Attorney of Rosebud County, Montana, deposes and says that on or about the 4th day of July, 1974, at Rosebud County, Montana, the above named defendant committed the offense of:

COUNT I: Deliberate homicide, a Felony, and
COUNT II: Aggravated Kidnapping, a Felony, and
COUNT III: Sexual Intercourse Without Consent, a Felony,

as specified in Sections 94-5-102, 94-5-303, and 94-5-503, Revised Codes of Montana of 1947, as amended.

The facts constituting the offense are:

Count I: That the defendant purposely and knowingly caused the death of another human being, to-wit: Peggy Lee Harstad, while engaged in the commission of the following felonies: Kidnapping and Sexual Intercourse Without Consent, involving the use of physical force and violence against the said Peggy Lee Harstad.

Count II: That the defendant knowingly and purposely and without lawful authority restrained another person, to-wit: Peggy Lee Harstad, by holding her in a place of isolation and by using physical force to facilitate the commission of a felony, to-wit: Sexual Intercourse Without Consent and for the purpose of inflicting bodily injury on and terrorizing the said victim, Peggy Lee Harstad, *(the alleged actions of the defendant resulted in the death of Peggy Lee Harstad.)* (Bracketed material and underlined material is amendment made by the Court on its own motion, after Coleman had entered his plea and over his objections.)

Count III: That the defendant knowingly had sexual intercourse without consent, with a female not his spouse, to-wit: Peggy Lee Harstad and inflicted bodily injury upon the said Peggy Lee Harstad in the course of committing sexual intercourse without consent.

6. Montanas New Death Laws
Enacted by Ch 338, Laws of 1977
Effective July 1, 1977

Part 3
Death Penalty

46-18-301. Hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 46-18-303 and 46-18-304 for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

46-18-302. Evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, and mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentence proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

46-18-303. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 45-5-102, and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim.

46-18-304. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

46-18-305. Effect of aggravating and mitigating circumstances. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 46-18-303 exists, the

court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

46-18-306. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 46-18-303 and 46-18-304. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

46-18-307. Automatic review of sentence. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in 46-18-308 through 46-18-310.

46-18-308. Time for review — consolidation with appeal. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

46-18-309. Transmission of transcript and record of trial. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

46-18-310. Supreme court's determination as to the sentence. The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 46-18-304; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

7. List filed by State with Montana Supreme Court of prisoners convicted of crimes where the victim was killed

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14448

The STATE of Montana, Plaintiff and Respondent,

v.

Dewey Eugene COLEMAN, Defendant and Appellant.

LIST OF PERSONS CONVICTED OF DELIBERATE HOMICIDE AND PRESENTLY INCARCERATED AT THE STATE PRISON

The following persons have been convicted of deliberate or first degree homicide and are presently incarcerated in the State Prison at Deer Lodge. Where the defendant has taken an appeal which is reported, the case citation is given.

For convenience, the following format is employed with respect to each defendant:

Name
County of Conviction
Sentence
Associated offense (Only felonies committed in conjunction with the homicide are listed, e.g., robbery, rape, arson.)
Date received at prison
Appeal (Citations of case)

1. Harold Armstrong
   Yellowstone County
   100 years
   4/22/75
   Robbery
   State v. Armstrong, 170 Mont. 256, 552 P.2d 616 (1976)

2. Norman Asp
Yellowstone County
100 Years
1/7/76

3. David Azure
Blaine County
11/9/76
60 years
State v. Azure, 34 St. Rptr. 1569, 573 P.2d 179 (1977).

4. Randall Baugh
Lincoln County
75 years
6/24/76
State v. Baugh, 34 St. Rptr. 1315, 571 P.2d 779 (1977).

5. Stanley Dean Baker
Park County
Life
10/20/70

6. Larry Blakney
Missoula County
40 years
5/22/78

7. Randall Braden
Cascade County
Life
12/15/71
Robbery
State v. Braden, 163 Mont. 124, 515 P.2d 692 (1973).

8. Anthel Brown
Gallatin County
100 years
11/8/76
Theft/rape/robbery

9. Gary Buckley
Lincoln County
100 years
12/23/75

10. Roger Caryl
Powell County
Life
7/26/74
State v. Caryl, 168 Mont. 414, 543, P.2d 389 (1975)

11. Charles Corliss
Lewis and Clark County
Life
1/20/66
Kidnapping
State v. Corliss, 150 Mont. 40, 430 P.2d 632 (1968)

12. Robert Close
Yellowstone County
Death
6/11/76
Kidnapping, robbery
Appeal pending

13. Dewey Eugene Coleman

14. John A. Daniels
Broadwater County
Life
3/23/71

15. James Dieziger
Cascade County
100 years x 2 (consecutive)
4/8/77

16. Bernard Fitzpatrick
Yellowstone County
Death
Kidnapping/robbery
State v. Fitzpatrick, ____Mont.____, 569 P.2d 383 (1977), appeal upon remand pending, No. 14422

17. Jerry Gallagher
Yellowstone County
Life
5/8/72
State v. Gallagher, 162 Mont. 155, 509 P.2d 852 (1973).

18. Vincent Hallam
Cascade County
100 years x 3 (consecutive)
2/23/76
Arson
State v. Hallam, 35 St. Rptr. 181, 575 P.2d 55 (1978).

19. Sherman Hawkins
Yellowstone County
Life
10/1/73
State v. Hawkins, 165 Mont. 456, 529 P.2d 1377 (1978)

20. Thomas Hilton
Deer Lodge County
Life
3/27/74

21. Harvey Hintz
Silver Bow County
100 years
11/12/75

22. Brad Huttinger
Cascade County
100 years
9/2/77

23. Thomas McGuinn
Silver Bow County
100 years
3/8/77
35 St. Rptr. 871 (7/28/78)

24. Lawrence McLean
Silver Bow County
100 years
6/4/76

25. Robert Nank
Rosebud County
100 Years
Rape
12/22/75

26. Lloyd Noble
Yellowstone County
Life
9/20/62
State v. Noble, 142 Mont. 284, 384 P.2d 504 (1963)

27. Vernie Owens
Yellowstone County
100 years
Robbery
6/1/78

28. Steven Pozder
Cascade County
50 years
5/7/76

29. Gary Quigg
Yellowstone County
Life
5/23/69
State v. Quigg, 155 Mont. 105, 467 P.2d 692 (1970)

30. John Radford
Yellowstone County
Life
4/1/70

31. Niel Ramberg
Missoula County
30 years (20 suspended)
9/13/76

32. Edwin Rasmussen
Fergus County
50 years (20 suspended)
9/9/75

33. Ronald Reinhardt
Dawson County
40 years
2/14/75

34. William Rose
Yellowstone County
Life
1/2/47

35. Kenny Schafer
Silver Bow County
100 years
11/12/75

36. David Sandstrom
Deer Lodge County
100 years
7/26/77
State v. Sandstrom, 35 St. Rptr. 744 (6/8/78), 580 P.2d 106 (1978)

37. Loren Sharbono
Richland County
75 years
5/2/75
State v. Sharbono, 34 St. Rptr. 196, 563 P.2d 61 (1977)

38. William Steelman
Yellowstone County
Life
Robbery
3/21/73

39. Andrew Sunday
Lewis and Clark County
100 years x 2 (consecutive)
9/11/78
Theft
Presently on appeal

40. Richard Stewart
Flathead County
100 Years
11/23/77

41. Gerald Van Nuland
Silver Bow County
Life
4/27/65

42. Albert Veraneau
Silver Bow
40 years
12/19/74

43. David Walters
Lewis & Clark County
Life
11/3/65
Kidnapping

43. James Wilson
Lewis and Clark County
100 years x 2
Theft
2/10/78

The following person was convicted of aggravated kidnapping but not of deliberate homicide:

44. Andrea Phillip Stewart
Cascade County
State v. Stewart, ____Mont.____, 573 P.2d 1138 (1978)

The undersigned has not asked prison personnel to run case histories to determine whether other persons have been sentenced for aggravated kidnapping but not deliberate homicide.

Respectfully submitted this _____day of November 1978.

MIKE GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

By: _____
MIKE McCARTER
Assistant Attorney General

8. LIST OF SIMILAR CASES, AND SENTENCES RECEIVED, IN CASES APPEALED TO THE MONTANA SUPREME COURT, AND CASES OF RECORD IN YELLOWSTONE COUNTY, MONTANA

(All of this information was also furnished to the Montana Supreme Court in writing at the time of oral argument on rehearing)

In *State v. Armstrong,* 170 Mont. 256, 552 P.2d 616, the defendant was convicted of deliberate homicide and robbery and received 100 years. This was reversed, he was convicted at his second trial and again sentenced to 100 years.

State v. Azure, 573 P.2d 179, shows a conviction of deliberate homicide and a 60 year sentence.

State v. Baugh, 571 P.2d 779, a case of deliberate homicide has a 75 year sentence.

State v. Braden, 163 Mont. 124, 515 P.2d 692, shows a conviction of deliberate homicide and robbery, with a life sentence. The defendant at the time of that crime was then on parole from a burglary conviction.

State v. Caryl, 168 Mont. 414, 543 P.2d 389, shows a conviction of two first degree murders plus a first degree assault. The opinion there shows that the defendant also killed two other persons at the same time, but his sentence was two consecutive life terms for the murders plus an additional 10 years for the assault, and he was not sentenced to death.

State v. Corliss, 150 Mont. 40, 430 P.2d 632. The facts in *Corliss* show that the victim was kidnapped, robbed, tied to a tree, and then murdered. The sentence was life for the murder and 10 years for the kidnapping, to be served consecutively. This decision also shows that a David Walters was also involved and that he plead guilty and was sentenced to imprisonment only. An interesting point in this decision is that although there both Walters and Corliss said that the other one had actually committed the murder, and Walters plead guilty and testified against

Corliss, that a lie detector test there admitted by the sheriff "showed conclusively that Walters shot Mr. Hammer." (430 P.2d 632).

Another case that was on appeal, but was vacated as his death sentence was unconstitutional under the same statute held unconstitutional in *Coleman,* was the case of *State v. Robert Close,* a case out of Yellowstone County which involved a conviction of deliberate homicide, kidnapping, and robbery. After his death sentence was held unconstitutional, Robert Close was then resentenced to imprisonment and did not receive a death penalty.

State v. Gallagher, 162 Mont. 155, 509, P.2d 852, is a familiar case, as Coleman's counsel is presently representing him on a federal court appeal in the Ninth Circuit. Gallagher was convicted of first degree murder and received a life sentence. The facts there showed that the victim had been taken to a lonely spot off a highway, tied, and there shot twice, once through the head, and once through the roof of the mouth, facts clearly showing that kidnapping also had to be involved.

State v. Hawkins, 165 Mont. 456, 529 P.2d 1377, shows a conviction of first degree murder with a life sentence.

State v. Quigg, 155 Mont. 105, 467 P.2d 692. This decision shows that the victim was last seen going toward his car at the Billings airport. His body was found on a county road near the airport so he had to have been kidnapped and taken there. He was killed by two bullets in the head with his own gun and robbed. The victim's car was found downtown the next day with his wallet with the money missing. The defendant with a previous felony record was convicted of first degree murder and received a life sentence.

In *State v. Sharbono,* 563 P.2d 61, the defendant was also represented by Coleman's present counsel. If the jury's verdict of guilt there was correct, then the facts were that the victim, the defendant's wife, was kidnapped, placed in a car, strangled, and the car run off the road and then set on fire. The sentence here was 75 years.

A defendant not listed on the state's list furnished as described above, but whose facts are known, as Coleman's counsel represented him, is Kenneth King. The state's facts were that the

defendant had left Nevada threatening to kill the victim, had travelled to Montana, and there shot and killed his victim. At the beginning of the trial a negotiated plea to mitigated deliberate homicide was made with a sentence of 10 years.

Another defendant represented by Coleman's counsel whose name is not in this same list is Joe Wheeler, who received a 10 year sentence on a negotiated plea based on facts showing that the victim was taken into the forest and there beaten to death.

An investigation as to certain defendants sentenced from Yellowstone County, where the court records are here available, shows:

(a) William Ray Steelman - charged with robbery, kidnapping, and murder in the first degree, plead guilty to robbery and murder in the first degree and was sentenced to 100 years as to the robbery and to life on the murder charge to be served concurrently.

(b) John Michael Radford - No. 7742, convicted of murder in the first degree and assault in the first degree by a jury and sentenced to life on the murder charge and 20 years on the assault charge to be served concurrently.

(c) Norman Ast - No. 9752, plead guilty to deliberate homicide and sentenced to serve 100 years.

Each and every one of these cases, when compared to Coleman, must lead to a finding that Coleman likewise should not receive a death sentence. In not one of these cases does a factor exist which would make them less subject to such punishment than Coleman.

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

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NO. 79-1553

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DEWEY EUGENE COLEMAN,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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The respondent, State of Montana, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinions in this case. The opinions are reported at 579 P. 2d 732 and 605 P. 2d 1000.

—o—

REASONS WHY THE WRIT SHOULD BE DENIED

1. The petition is not timely filed with respect to issues raised and disposed of in petitioner's first appeal.

As part of his shotgun approach petitioner seeks review of issues addressed in the opinion of the Montana Supreme Court dated July 10, 1978, which opinion affirmed petitioner's three convictions and remanded to the district court for resentencing in two counts. Specifically, petitioner is foreclosed from raising issue no. 3 which was addressed and disposed of in the first appeal. Sup. Ct. R. 22. *United States ex rel. Coy v. United States,* 316 U. S. 342 (1942).

2. The petition does not raise a substantial federal question which has not heretofore been decided by this Court.

Petitioner cannot distinguish *Dobbert v. Florida,* 432 U. S. 282 (1977), which disposes of the arguments he proposes in support of issue no. 1. The fact that Dobbert's crimes antedated this Court's ruling in *Furman v. Georgia,* 408 U. S. 238 (1972), whereas petitioner's crimes were committed after Montana had enacted a post *Furman* mandatory death penalty act, leads to the conclusion that Montana's position is even stronger than was Florida's in *Dobbert.*

Petitioner's double jeopardy claim in issue no. 2 is controlled by *Williams v. Oklahoma,* 358 U. S. 576, 586 (1959). Again, Montana's position is stronger in that petitioner was convicted of both offenses simultaneously. Even if double jeopardy principles apply the state may

elect which crime it will prosecute and there is no rationale that would support compelling Montana to elect the crime for which the lesser punishment was imposed.

Petitioner's contention in issue no. 4 is similar to that made and rejected in *Proffitt v. Florida,* 428 U. S. 242, 252 (1976). Although this Court has found jury sentencing to be constitutionally permissible, it has rejected the contention that jury sentencing is mandatory.

Montana's death penalty statutes challenged in issue no. 5, pass muster under *Gregg v. Georgia,* 428 U. S. 153 (1976); *Proffitt v. Florida,* 428 U. S. 242 (1976); and *Jurek v. Texas,* 428 U. S. 262 (1976); and do not offend the principles established in *Lockett v. Ohio,* 438 U. S. 586 (1978). Montana's capital punishment statute regarding mitigating circumstances directs the court to consider "[a]ny other fact [which] exists in mitigation of the penalty." Section 46-18-304, Montana Code Annotated. (Petitioner's Appendix P. 145.)

Gregg, as well as *Proffitt* and *Jurek,* dispose of petitioner's issue no. 6 in that this Court has left the scope of comparison of similar cases involving the death penalty largely up to the states. In *Gregg,* this Court specifically rejected contentions that the Georgia Supreme Court was required to include in its comparison either non-appealed capital cases in which life sentences were imposed or homicides in which capital convictions were not obtained. Montana's small population simply dictates that the number of comparable cases will be small.

Petitioner's argument in issue no. 8 does not raise a burden of proof question but rather a definition of crime question already decided by this Court in *Patterson v.*

New York, 432 U. S. 197 (1977). Defining knowledge as an awareness of probable consequences is consistent with modern concepts of intent. *United States v. United States Gypsum Co.,* 438 U. S. 422 (1978). The state is still required to prove knowing conduct beyond a reasonable doubt. Finally, the inference described in the disputed jury instruction under issue no. 8 is purely permissive in the sense described in *County Court of Ulster County v. Allen,* — U. S. —, 99 S. Ct. 2213 (1979).

3. Petitioner has raised purely factual issues that have been resolved against him in the court below.

The factual issue raised in issue no. 7 was resolved against petitioner by the Montana Supreme Court. *State v. Coleman,* — Mont. —, 605 P. 2d 1000, 1018 (1979). (Petitioner's Appendix P. 62.)

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CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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